IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 553.

OSCAR LESER ET AL.

against

J. MERCER GARNETT ET AL.

MOTION TO DISMISS WRIT OF ERROR.

ALEXANDER ARMSTRONG,
Attorney-General of the State of Maryland,
LINDSAY C. SPENCER,
Assistant Attorney-General of the State of Maryland,
GEORGE M. BRADY,
ROGER HOWELL,
JACOB M. MOSES,
For Defendants in Error.

Daily Record Co. Print, Baltimore, Md.

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Now come the defendants in error and respectfully move the Court to dismiss the writ of error filed herein and for cause show:

1. That the Court has no jurisdiction to review by writ of error the decision of the Court of Appeals of Maryland in the above case.

ALEXANDER ARMSTRONG,

Attorney-General of the State of Maryland,

LINDSAY C. SPENCER,

Assistant Attorney-General of the State of Maryland,

GEORGE M. BRADY,

ROGER HOWELL,

JACOB M. MOSES,

For Defendants in Error.

BRIEF IN SUPPORT OF MOTION TO DISMISS WRIT OF ERROR.

STATEMENT OF FACTS.

On October 12, 1920, Oscar Leser, one of the plaintiffs in error, appeared before the Board of Registry of the Seventh Precinct of the Eleventh Ward of Baltimore City and made protest against the registration of two women, the defendants in error, Cecilia Street Waters and Mary D. Randolph. The board allowed the registration of the two women, whereupon the plaintiffs in error brought a petition in the Court of Common Pleas of Baltimore City to strike the names of the two women so registered from the books of registration, such action on their part being held authorized under the provisions of Section 25 of Article 33, Code of Public General Laws of Maryland (Leser vs. Garnett, 114 Atl. 840).

The grounds upon which this petition was based were:

(1) That the Constitution of Maryland confines the right of suffrage to males; (2) that the Nineteenth Amendment to the Constitution of the United States, upon the strength of which the board had overruled the protest made to them, was invalid—first, in that it was not such an amendment as the Congress of the United

States is authorized by Article V of the Constitution to propose to the Legislatures of the several States to be by them ratified, and as such was an unconstitutional amendment; second, in that the said Nineteenth Amendment had never in fact been ratified by the Legislatures of three-fourths of the States and had never become a part of the Constitution of the United States.

The Court of Common Pleas on January 28, 1921, filed an opinion holding that the Nineteenth Amendment was valid and had been properly ratified by the required number of States, and dismissing the petition of the plaintiffs in error. On appeal this was affirmed by the Court of Appeals of Maryland (Leser vs. Garnett, 114 Atl. 840), and a writ of error to the Supreme Court of the United States was allowed by the Honorable A. Hunter Boyd, Chief Judge.

ARGUMENT.

1. THE SUPREME COURT HAS NO JURISDICTION TO REVIEW BY WRIT OF ERROR THE DECISION OF THE COURT OF APPEALS OF MARYLAND.

The plaintiffs in error in this case sought, briefly, to have stricken from the list of registered voters of Baltimore City the names of two women, upon the ground that a provision of the State Constitution limiting the right of suffrage to males was valid and that a provision of the United States Constitution, viz., the Nineteenth Amendment, was invalid. The decision of the Court of Appeals of Maryland, which it is sought to have reviewed, was that the provision of the State Constitution in question was invalid, and that the provision of the United States Constitution in question was valid.

No other question outside of the interpretation of the local statutes with respect to the protesting of unqualified voters was at issue; no other question was decided.

It follows that there is presented no one of the cases in which a judgment or decree of the highest court of a State is reviewable by writ of error under Section 709 of the Revised Statutes of the United States. This suit drew in question the validity of a provision of the United States Constitution, and the decision was in favor of its validity. The plaintiffs in error insisted that under the Constitution of Maryland only male citizens were entitled to be registered as voters. The Board of Registry, the defendants in error, Waters and Randolph, and the intervening defendants in error, Roberts et al., admitted this, but claimed that the right to be so registered was extended also to female citizens because of the Nineteenth Amendment to the United States Constitution. Here was clearly a right or privilege claimed by the defendants in error under a statute of the United States within the meaning of Revised Statutes, Section 709; and had the decision of the Court of Appeals of Maryland been adverse to this claim, there could be no doubt of their right to a writ of error to review that decision. Such was not the case. The decision of the Court was in favor of the right asserted by the defendants in error; and the plaintiffs in error, who have set up no Federal right or privilege personal to themselves or their status as citizens, have no right to have the decision reviewed by writ of error.

State of Missouri vs. Andriano, 138 U. S. 496; 34 L. Ed. 1012; 11 Sup. Ct. Rep. 385.

There was further drawn in question the validity of a provision of the State Constitution. The plaintiffs in error claimed that this provision was valid and in force.

The defendants in error claimed that the provision in question was rendered invalid by the Nineteenth Amendment to the Constitution of the United States. Had the Court of Appeals of Maryland upheld the contention of the plaintiffs in error, there would have been clearly a case in which a State statute, questioned on the ground of repugnance to the Federal Constitution, had been upheld by the State court; and there would have been no doubt of the right of the defendants in error to a writ of error to review the decision. The contrary was the case; the decision of the Court of Appeals was against the validity of the provision of the State Constitution as being repugnant to the Constitution of the United States. A writ of error does not lie in such a case.

Commonwealth Bank of Kentucky vs. Griffith,
14 Pet. 56; 10 L. Ed. 352.

The plaintiffs in error also attacked the validity of the Nineteenth Amendment upon the ground that it was never properly ratified by the requisite number of State Legislatures, in that the Legislatures of the States of Missouri and Tennessee were not competent under the provisions of the Constitution of those States and further in that the Legislatures of the States of Tennessee and West Virginia ratified the amendment in violation of their own rules of parliamentary procedure and of the laws and constitutions of those States. The decision of the Maryland Court of Appeals adverse to the contention of the plaintiffs in error manifestly is a decision in favor of the validity of a provision of the Federal Constitution and as such is not subject to review by writ of error.

Moreover, objections to the validity of an enactment of a State Legislature, based upon the ground that such

Legislature was not competent or duly organized, or that such enactment was not enacted as required by the State Constitution, are not reviewable on writ of error by the Supreme Court.

> *Scott vs. Jones*, 5 How. 343, 12 L. Ed. 181.
> *Atlantic & Gulf Railroad Co. vs. State of Georgia*, 98 U. S. 359, 25 L. Ed. 185.
> *Smith vs. Jennings*, 206 U. S. 276, 51 L. Ed. 1061, 27 Sup. Ct. Rep. 610.

Furthermore, the substance of that which the plaintiffs in error sought in this connection with respect to the objections, based upon the Constitutions of the States of Missouri and Tennessee, is that the resolutions of ratification in those two States were invalid as being contrary to the State Constitutions. Such resolutions were "statutes" of those States within the meaning of Section 709, Revised Statutes. (See Williams vs. Bruffy, 96 U. S. 176, 24 L. Ed. 716; Ross vs. Oregon, 227 U. S. 150, 57 L. Ed. 458, 33 Sup. Ct. Rep. 220.) The Supreme Court has no authority to declare a State law void under a State Constitution, nor to review a decision by a State Court where the question involved is the conformity of a Statute with a State Constitution. Nor does the alleged error of a State court in construing the law of another State raise a Federal question.

> *Smith vs. Jennings*, 206 U. S. 276, 51 L. Ed. 1061, 27 Sup. Ct. Rep. 610.
> *Johnson vs. New York Life Insurance Co.*, 187 U. S. 491, 47 L. Ed. 273, 33 Sup. Ct. Rep. 174.

For the reasons stated, we respectfully submit that this Honorable Court has no jurisdiction to review by writ of error the decision of the Court of Appeals of Maryland

in this case, and that the motion to dismiss the writ of error should accordingly be granted.

Respectfully submitted,

ALEXANDER ARMSTRONG,

Attorney-General of the State of Maryland,

LINDSAY C. SPENCER,

Assistant Attorney-General of the State of Maryland,

GEORGE M. BRADY,

ROGER HOWELL,

JACOB M. MOSES,

For Defendants in Error.

Service of copy of the above motion to dismiss and brief in support thereof admitted this day of November, 1921.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921

No. 552

OSCAR LESER ET AL.,
PLAINTIFFS IN ERROR

Against

J. MERCER GARNETT ET AL.,
DEFENDANTS IN ERROR

ON ERROR AND PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR DEFENDANTS IN ERROR CAROLINE ROBERTS, CLARA T. WAITE, JOSEPHINE L. CHATARD, EUGENIA H. PARKER, MADELINE LEMOYNE ELLICOTT, A. PAGE REID, MARGARET T. CAREY, ANNA W. HEATH, EVELYN F. LORD, ANNIE JANNEY, MARY W. RAMEY, AND HATTIE M. EMMERT.

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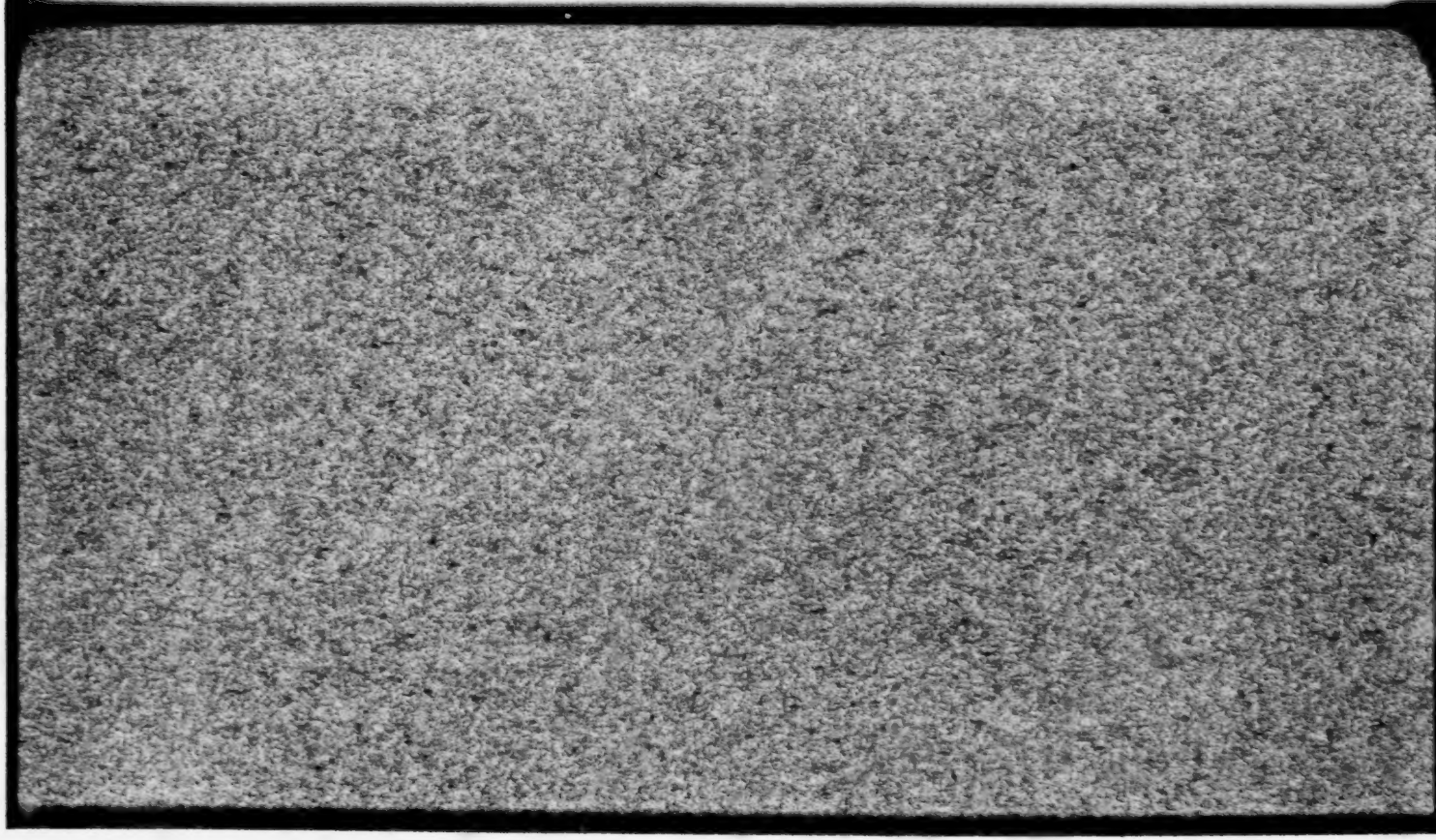
JACOB H. MOORE,
Of Counsel.



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Of Counsel.

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INTRODUCTION

This is a case brought for the sole purpose of testing the validity of the Nineteenth Amendment to the United States Constitution. Its validity is attacked upon several grounds, which may be arranged in two main groups, as follows:

(1) That the Amendment is not within the amending power conferred by Article V of the Constitution of the United States.

(2) That the Amendment has not been formally and properly ratified by the requisite number of State Legislatures.

At the time of trial, 37 States had ratified the Amendment; since then Vermont has also ratified, making 38 in all, or two more than three-fourths of the States. The Court will take judicial notice of the subsequent ratification of Vermont.

Dillon vs. Gloss, 256 U. S. ———, (decided May 16, 1921).

ARGUMENT.

I.—THE OPERATION AND EFFECT OF THE NINETEENTH AMENDMENT.

The Amendment reads as follows:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of sex.
>
> "Congress shall have power to enforce this article by appropriate legislation."

It is exactly similar in its general wording to the Fifteenth Amendment, prohibiting the denial or abridgment by the United States or any State, of the right of citizens of the United States to vote, on account of race, color, or previous condition of servitude. It must be interpreted in the same manner as the Fifteenth Amendment; and cannot be regarded as encroaching upon the rights of the several States to administer their internal affairs to any greater extent than did the Fifteenth. The operation and effect of the Fifteenth Amendment was set forth at some length in *Guinn vs. United States*, 238 U. S. 347, 362, by White, C. J. as follows:—

"Beyond doubt the Amendment does not take away from the State governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of State and National authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the State would fall to the ground. In fact the very command of the Amendment recognizes the possession of the general power of the State, since the Amendment seeks to regulate the exercise as to the particular subject with which it deals.

"But it is equally beyond the possibility of question that the Amendment in express terms restricts the power of the United States or the States to abridge or deny the right of a citizen of the United States to vote on account of race, color, or previous condition of servitude. The restriction is coincident with the power and prevents its exertion in disregard to the command of the Amendment. But while this is true, it is true also that the Amendment does not change, modify, or deprive the States of their full power as to suffrage except, of course, as to the subject with which the Amendment deals and to the extent that obedience to its command is necessary."

By the self-operating effect of that Amendment, the word "white" in those State Constitutions which limited the suffrage to white male citizens, was stricken therefrom.

Neal vs. Delaware, 103 U. S. 370.
Guinn vs. United States, supra.
Myers vs. Anderson, 238 U. S. 368.

The Nineteenth Amendment must have the same effect with respect to the limitations of suffrage to male citizens. And this is true for all elections, National, State or Municipal, regardless of whether the State in question had ratified the Amendment or not.

Myers vs. Anderson, supra.

As is indicated by the quotation above from *Guinn vs. United States*, no right of suffrage is granted except indirectly; the States and the United States are merely forbidden to *discriminate* against citizens of the United States, in extending the right to vote, on account of sex.

United States vs. Reese, 92 U. S. 214.
United States vs. Cruikshank, 92 U. S. 542.

This was concisely summed up in the latter case in the following words:

> "The right of suffrage is not a necessary attribute of national citizenship; but exception from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

No additional power is given to the Federal government to interfere with the right of local self-government in the States, with the exception that Congress may legislate concerning State and Municipal elections *solely* for the purpose of preventing the prohibited discrimination.

United States vs. Mumford, 16 Fed. 223.

II.—THE NATURE AND EXTENT OF THE AMENDING POWER.

Is the Nineteenth Amendment such an amendment as Congress may not propose or the State Legislatures ratify? Is it by its nature beyond the amending power under the Constitution of the United States? To answer this question it is essential that the nature and extent of the amending power—the most fundamental power existing in any political society, the power which Calhoun aptly termed the *vis medicatrix* of our entire system of government—be examined into and that determination be made as to what, if any, limits may exist upon its exercise.

The language of Article V is broad and general in its terms. It reads as follows:—

> "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions

in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year one thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

The article stands as a recognition on the part of the framers of the Constitution that the instrument of which they were the authors might in the course of time and under different conditions require changes; and that it was requisite that a mode for effecting these should be provided.

The Federalist, No. 43.
Hawke vs. Smith, 253 U. S. 221, 226.

It is, however, contended in the present case that such changes are restricted in kind and character; and that the Nineteenth Amendment falls without the limits prescribed by the Constitution. This contention sees two classes of restrictions upon the character of proposed amendments, viz., an implied restriction that no amendment can constitutionally operate to work a fundamental transformation in the nature of our system of government; and express restrictions contained in the Article itself,—of which at this time there is the one only that no State may without its consent be deprived of its equal suffrage in the Senate—as well as other provisions of the Constitution claimed to act as such express restrictions. Within both these classes, it is contended, the Nineteenth Amendment falls.

A. THE QUESTION OF IMPLIED RESTRICTIONS.

I.—Existence of Implied Restrictions Negatived by Wording of Article V.

We respectfully submit that the existence of implied restrictions upon the amending power is negatived at the very outset by the wording of Article V itself. It is very apparent that the Article makes no effort whatsoever to define the character of the amendments that might be proposed and ratified, beyond the express limitations that are there set forth. Those restrictions upon the amending power were the specific ones

which the Constitutional Convention deemed necessary to exclude from the power of Congress to propose to the legislatures of the several States or to Conventions therein. The very fact of their incorporation into the Article as express exceptions from the amending power constitutes a negation upon the existence of others; for it follows immediately that the framers of the Constitution, by reason of the very fact that they deemed it necessary expressly to prohibit such an amendment as, for instance, the depriving any State of its equal suffrage in the Senate, must necessarily have contemplated the possibility of the extension of the amending power to such a subject unless provision to the contrary were made. They thought it necessary to make express provision against such an exercise of the power, and thereby recognized that no implied restriction existed as against it. It is impossible to infer an intention that any other limitations upon the character of amendments that might be proposed and adopted, other than those named in the Constitution itself, should exist, solely by implication.

Frierson, Amending the Constitution of the United States, 33 Harvard Law Review, 659.

And in the recent case of *Dillon vs. Gloss*, 256 U. S.—(decided May 16, 1921), this Court said:—

> "An examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments. Passing a provision long since expired, it *subjects this power to only two restrictions*: one that the proposal shall have the approval of two thirds of both Houses, and the other excluding any amendment which will deprive any State without its consent, of its equal suffrage in the Senate." (Italics ours.)

2.—Evidence of Implied Restrictions Negatived by Nature and Source of Amending Power.

But even without this, it is further submitted that no implied limitations upon the amending power can be read into the Constitution and this by virtue of the nature and source of the amending power itself.

"There is", says a great apostle of States' Rights, "a higher power,—placed above all by the consent of all,—the creating

and preserving power of the system—to be exercised by three-fourths of the States,—and which under the character of the amending power, can modify the whole system at pleasure,—and to the acts of which none can object."

Calhoun, The South Carolina Exposition (Works of Calhoun, Ed. Crallé, Vol. VI, p. 50).

It is an axiom of political science that in every politically organized community entitled to be called a State there exists an authority to which from the legal point of view, all interests are potentially subject. It is the repository, so to speak of the supreme will of the State, and the entire body of laws, public and private, as they exist at any one time, are but the expression of this supreme will in so far as it has found expression. It is the ultimate and sole source of all laws for the State, and being so, there can be no legal restrictions upon it except those which are self set. By constitutional provisions, this authority can provide for the governmental organization of the State, and apportion various rights and powers among the various parts of that organization. This apportionment it may change at will, for there is no higher power above it. It has created for itself a certain form in accordance with which its machinery shall function; but being itself the creative power, it can not bind itself by its own creation, except in so far as it may consent thereto.

"The limitations upon State action set by law are obviously merely formal in character. They are self-set by the State and the same power which has decreed them still has the power to alter or abolish them, though this alteration or abolishment must be done in the formal and legal way."

Willoughby, The Nature of the State, p. 214.

If the supreme will of the State, the ultimate law-making power, desires to change the apportionment of governmental powers as laid down in the Constitution of the State, there is no legal restraint upon it. It is itself the source of law while the instrument which it has adopted to delimit the powers of its governmental machinery is merely the expression of its sovereign desire at any one time. Restrictions may indeed be implied under that instrument for or against the exercise of

certain powers granted to governmental organs; but none can be implied thereunder as against the exercise by the ultimate authority of the State itself, by virtue of its sovereign prerogative, of its right to change or modify at will the distribution of governmental powers, which it has formerly adopted, in the manner which it has itself prescribed. It can create and, therefore, in the prescribed manner and subject to an orderly process it can change, abolish, or re-create at pleasure.

In this country, the ultimate source of authority, the power which ordained the Constitution and which can therefore change it, is stated in the Preamble—the People of the United States.

> *Martin vs. Hunter's Lessee*, 1 Wheat. 304, 324.
> *McCulloch vs. Maryland*, 4 Wheat. 316, 403.
> *Hawke vs. Smith*, 253 U. S. 221, 226.
> *Dillon vs. Gloss*, 256 U. S. —(Decided May 16, 1921)

By the Constitution they made a certain apportionment of governmental powers and vested some thereof in the National Government and others in the Governments of the several States. Those powers so apportioned were hedged about with various restrictions, some express, some, perhaps, implied; beyond those restrictions the governmental agencies exercising those powers could not venture. In addition the sovereign power which so created the Constitution and adopted such a distribution of governmental powers, provided a way in which the provisions of the instrument created by it could be changed. As to one certain kind of change it provided that only after a certain time could it be made; as to another kind, it provided that only in one certain way could it be made; as to all others it provided the means by which they should be brought about.

To say that by virtue of having established a certain kind of governmental organization, the sovereign power thereby impliedly divested itself of its right to make fundamental changes therein is to say nothing less than that it divested itself of the sovereignty inherent in it. It is confusion between the sovereign power itself and the government which is the instrument of the sovereign power. Sovereignty is indefeasible and inalienable; and cannot pass from the body politic so long as the latter exists.

Jameson, Constitutional Conventions, p. 20.
Lieber, Political Ethics, Vol. I, p. 250.

"The sovereign people—did not, in adopting the Constitution, leave the stage, but they can at any instant use again, to the fullest extent, their sovereignty."

Von Holtz, The Constitutional Law of the United States, Sec. 15.

And when the sovereign power has acted, in the manner which it has prescribed for itself, to change the distribution of its governmental powers, no limit to the extent of the change which it so makes can be implied from the fact that such a change affects fundamentally the nature of the government.

"It has at times been alleged that no amendment in violation of the 'spirit' of the Constitution or providing for a change in the essential nature of the American State would be valid. The argument in support of this view rests, however, upon a conception of the Constitution as a contract between the States."

Willoughby, The Constitutional Law of the United States, Vol. I, p. 521.

The most notable and forceful exponent of a construction of the Constitution as a contract between independent sovereign States was John C. Calhoun; so that since, as indicated above, the argument, that implied restrictions should be read into the Constitution against the right to make a change in the essential nature of the distribution of governmental powers, rests upon such a construction, his views upon the nature and extent of the amending power are of particular interest and weight. And Calhoun repeatedly, throughout his political writings, asserts a doctrine of the absolute supremacy of the amending power under Article V, and its absolute ability to work any and all changes in the distribution of the power of government.

Works of Calhoun, ed. Cralle, Vol. I, pp. 138-139, 284-302; Vol. VI, pp. 36-37, 50-51, 68-69, 111-112, 142-143, 172-180, 224-226.

"Government", he says, "is the representative of a State and the organ through which it acts. As such it is vested with all

powers necessary to the performance of its high functions and which are not prohibited or expressly withheld by its Constitution, and among them, the most important of all, that of self-preservation. In our complex political system, the powers belonging to Government, as has been stated, are divided,—a portion being delegated to the Federal Government, as the common representative of all the States in their united character; —and the residue expressly reserved, to be exercised by the States in their separate and individual character. Of this portion, the State Governments are the representatives and organs; and as such, are invested with all the powers not delegated, which properly appertain to Government, and which are not prohibited by their own, or the Federal Constitution. But they do not comprehend the power to make, alter or abolish constitutions, which, according to our political theory, belongs exclusively to the people; and cannot be exercised by Government unless specially delegated by the Constitution. . . The people may alter or abolish their Constitution—but they can only do it by acting according to the prescribed forms."

Letter to Hon. William Smith, July 3, 1843 (Works, Vol. VI, p. 224).

"By an express provision of the Constitution it may be amended *or changed* by three-fourths of the States; and thus each State by asserting to the Constitution with this provision, has modified its original right, as a sovereign, of making its individual consent necessary to *any change in its political condition*: and by becoming a member of the Union, has placed this important power in the hands of three-fourths of the States,—in whom the highest power known to the Constitution actually resides." (Italics ours.)

South Carolina Exposition (Works, Vol. VI, p. 37).

As a result of his view of the Constitution as a compact between sovereign states, he derives his doctrines of "State Interposition" or "Nullification", under which he vests any State with the right to nullify an unwarranted assumption of power by the Federal Government, because of the right, inherent in each State by virtue of its orignial sovereignty and unsurrendered by each, of self-government. This right, however, if not counterpoised, he recognizes might tend too strongly to weaken

the General Government and derange the entire system; and the counterpoise he places in the strengthening of the amending, or as he prefers to call it, the repairing power, by placing this power in the hands of three-fourths of the States, whose act then is binding upon all, rather than leaving it necessary to obtain unanimous consent to any change as was the case under the Articles of Confederation. His conclusion is that although a State might exercise this power of nullification against unwarranted assumptions of power by the General Government, nevertheless it is equally true that, no matter how unwarranted such an assumption may be under the Constitution, if the contested power, by an amendment to the Constitution, is granted to the General Government by three-fourths of the States, the controversy is then terminated against the State which has contested it. This theory is set forth very clearly and at considerable length in his work "On the Constitution and Government of the United States"; in the "South Carolina Exposition"; in his "Address on the Relation of the States and Federal Government; in his "Report on Federal Relations"; in the "Address to the People of South Carolina"; in a Letter to Governor Hamilton of South Carolina, August 28, 1832; and in a letter to the Hon. William Smith on the Rhode Island Controversy, July 3, 1843.

Works of Calhoun, ed Cralle, Vol. I, pp. 138-139, 284-302; Vol VI, pp. 36-37, 50-51, 68-69, 111-112, 142-143, 172-180, 224-226.

Out of the mouth of the greatest exponent of that theory of the American system of government upon which rests any implied restriction upon the amending power that would prevent it from extending to fundamental changes in the existing form of government, such restrictions are denied and the doctrine condemned.

And this must necessarily follow from the nature of the amending power as an essential attribute of sovereignty, inherent in the ultimate authority of the State. Whether that sovereignty be vested in the people of the United States collectively, or in the peoples of the several States, or in the States themselves as the supreme source of power, is immaterial. That sovereign power, wherever it be located, carries

with it the right to amend the instrument by which it has distributed governmental power, unhampered by all except those restrictions which it has itself imposed. The method in which the change shall be made may properly be laid down in its formal constitution, and must be followed. But the right to make the change is not and cannot be surrendered, and is beyond legal limitation; the prescribed method having been followed, any and all changes are and must be valid.

In a recent case this Court has said:—

> "The people of the United States, by whom the Constitution was ordained and established have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several states and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by three-fourths of the states shall be taken as a decisive expression of the people's will and be binding on all."
>
> *Dillon vs. Gloss*, 256 U. S. — (decided May 16, 1921.)

3.—The Nineteenth Amendment Is Within The Meaning of The Word "Amendments" As Used in Article V.

The argument was further made by those attacking the validity of the Nineteenth Amendment that the right of the sovereign power to alter its constitution of government in any manner may be granted; but that the method of making such alteration is not laid down in Article V—that the word "amendments" therein is properly to be restricted in its meaning to changes closely related to the subject matter of the whole instrument—that any change which can be made in the manner prescribed by the Article must be of a kind "germane" to the other parts of the Constitution. Any alterations working a fundamental change in the distribution of governmental powers, it was contended, are not germane, cannot be adopted under Article V, but must be made and ratified in the same manner and by the same agencies as the original constitution, to wit, by a convention whose acts are ratified by *every* State.

It is difficult to see, even admitting the validity of the argument, in what way the Nineteenth Amendment is thereby

barred from proposal and ratification under the provisions of Article V, as an amendment contrary to the purposes of the original Constitution. Those purposes are set forth in the Preamble as follows:

> "We, the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Does the Nineteenth Amendment run counter to these purposes? Does it not rather operate to give them voice and effect? "To form a more perfect union;" one of the main objections raised against the Amendment is that it lays open a way to weld the component parts of this nation too closely into one whole. By a "more perfect" union, the framers meant nothing if they did not mean a "closer" union; under the Articles of Confederation, the union was found to be too loose, too cumbersome, too much hampered by the individual powers of each separate State, and the result was the Constitution. Union does not mean that the parts must forever be kept separate and distinct, but on the contrary that they are to be brought together and merged into one another.

"To establish justice;"—and is not that the very aim and purpose of the Amendment? To give citizens of their country, subject to its laws, a right to have a voice in the making of those laws and the choosing of their representatives in the law-making bodies, after long years of being classed with criminals, infants, and lunatics—is not this an establishment of justice which is in direct keeping with the true principles of democratic and republican forms of government?

"To promote the general welfare";—the proponents of equal suffrage have vigorously contended, for more than half a century, that the general welfare will be promoted by its adoption; its opponents have just as strenuously denied it. The enactment of the Nineteenth Amendment is an utterance by the sovereign people of this country that the general welfare is so promoted; and their verdict is not open to dispute.

"To secure the blessings of liberty to ourselves and our pos-

terity";—no greater blessing of liberty can exist than the right to a voice in the functioning of governmental power. Without it, there can be no liberty for one who is compelled to accept silently any and all commands of a government in which he has no voice. The women of the United States constitute a portion of its people; and if the Nineteenth Amendment, by vesting in them the right to make their voice heard in their government, has endowed them and their posterity with that greatest blessing of liberty, it is in keeping with the express purposes of the Constitution and germane to it.

That the word "amendments" in the Constitution means alterations, of whatever kind and character, in that instrument was, however, unquestionably the intention of it framers.

The Federalist, No. 43.

The point was decided, by implication at least in the Prohibition Amendment cases. The same argument was raised at that time and vigorously pressed; certainly, if it could be regarded as valid, it would attach with much greater readiness to the Eighteenth Amendment than to the Nineteenth, for the former not only took away from the several States their police power over certain subjects, but in addition was in no wise related to any former provisions of the Constitution. As its opponents argued, it *added* a new provision instead of *amending* one already existing. Yet it was held a valid exercise of the amending power.

Rhode Island vs. Palmer, 253 U. S. 350.

The whole argument that an amendment, to come under the provisions of Article V, must be related to some one or more specific parts of the Constitution is well answered in a recent case by the District Court for the Southern District of Ohio, through Hollister, J., in the following words:

> "It is urged, as I understand it, that an amendment must be germane to that which it amends, and that there is no clause in the Constitution to which the proposed amendment (The Eighteenth) is in any way related. Assuming, however, that it is not, yet one is not willing to go so far as to say that the people have limited their right to surrender their power over any subject theretofore reserved, because unrelated to any power theretofore surrendered. The amendment goes to the Constitution

> as a whole, not necessarily to any particular clause in it. The Constitution is the organic and fundamental law, but that law may be changed, added to, or repealed, if that is done by the States and the people themselves in the way provided. Their power to better it, as they think, is not to be hamstrung by mere rigidity of definition of words. Adding something new to the organic law is an amendment to the organic law in the judgment of this Court."
>
> *State of Ohio, ex rel. Erkenbrecher vs. Cox*, 257 Fed. 334, 342.

The sovereign power of the nation established the Constitution and the one basic, underlying purpose of that instrument was to make a distribution of governmental powers between two sets of agencies—the National and the State Governments. An amendment which operates to change that distribution is germane as nothing else can be,—is an amendment in the strictest sense of the word—for it goes to the root of the whole instrument and amends it in order to make it conform to a change in the idea of the sovereign people as to the manner in which governmental power shall be distributed.

4. The Analogy Between Amending and Taxing Power Is Not Well Founded.

The analogy attempted to be drawn between the limitations existing upon the taxing power granted to Congress by Article I, Sec. 8, Par. 1, by implication from the dual system of government established by the Constitution, exemplified by the case of *Collector vs. Day*, 11 Wall. 111; and the similar limitations sought to be placed upon the amending power, is an analogy only and an ill-founded one. That case, and others like it, hold, it is true, that, although a general grant of power was made to Congress to lay and collect "taxes, duties, imposts and excises, to pay debts and provide for the common defense and general welfare of the United States" without express limitation beyond one of uniformity, yet such power was impliedly limited by the distribution of all governmental powers under the Constitution; and since the power to tax was the power to destroy, an attempt by Congress to levy a tax upon governmental instrumentalities of the several States was unconstitutional. Those holdings were manifestly correct and in no manner opposed to the view that the amending

power is substantially unlimited and entirely so as far as concerns any implied restrictions from the nature of the form of government established by the Constitution.

Congress, in seeking to exercise such a power as the taxing power, was a *governmental* agency exercising a *governmental* power. It could not validly go beyond the limits of the powers granted to it by the Constitution which established it. It was bound by the Constitution as it then stood, and by the distribution of governmental powers there laid down. To regard it as capable of deranging the entire system was to regard it as capable, in effect, of *amending* the Constitution—of exercising, as a *governmental* agency, a power inherent in *sovereignty* and not granted to it. As an instrument of *government*, it could not assume the exercise of *sovereign* rights uncontrolled by the distribution of governmental powers under the Constitution, without itself becoming the sovereign, unless such rights were granted it by the ultimate authority within the body politic. The right to amend the Constitution by a simple legislative act was not so granted. But that is a different thing from saying, as is said here, that under the amending power Congress cannot validly by a two-thirds vote, propose for ratification by the legislatures of three-fourths of the States an amendment which would have the effect of utterly transforming the present scheme of distribution of governmental authority. Such cases as those cited do not hold that an amendment to the Constitution by which Congress was expressly authorized to tax State governmental instrumentalities would be improper; they hold simply that under the Constitution, as it stood, *unamended*, no such power to tax could be assumed.

5.—The Argument From Consequences of No Validity.

In construing the operation and effect of the Fourteenth Amendment, Justice Miller used the following language:

> "Was it the purpose of the Fourteenth Amendment—to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal Government. * * * All this and more must follow, if the proposition of the Plaintiffs in error be sound. * * * The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument.

> But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, *in the absence of language which expresses such a purpose too clearly to admit of doubt.*" (Italics ours.)
>
> *The Slaughter House Cases*, 16 Wall. 36, 77-78.

And accordingly the Fourteenth Amendment — and undoubtedly the same will hold true for the Nineteenth — was given an interpretation which did not endow the Federal Government with additional powers so great as fundamentally to alter the nature of the existing form of government. It is noteworthy—particularly in view of the fact that the invalidity of the Nineteenth Amendment is sought to be established from the possibility of its effecting such a fundamental change rather than from any fear that it will probably do so—that the Fourteenth Amendment, although recognized as possessing a similar possibility, was not held invalid. But aside from that, and assuming, *argumentum ad argumentandum*, that the necessary and direct effect of the Nineteenth Amendment is to work such a fundamental change, can, then, its invalidity be argued from the words of Justice Miller? We respectfully submit that the very reverse is the fact; and that those words say, in effect, that the Court will never construe any amendment as causing a radical change in our theory of the relations of the State and Federal Governments as long as there is room for doubt that such a change was intended and a contrary interpretation may possibly be placed upon them. But, if the language of the amendment expresses that purpose too clearly to admit of doubt, then the force of the argument from consequences loses its irresistible force and the amendment, together with the radical change embraced by it, will stand as part of the Constitution.

6.—Summary.

We respectfully submit that agreeably to Article V, the

people of the United States may, acting in their sovereign capacity, through the agency of two-thirds of both houses of Congress and the legislatures of three-fourths of the several States, amend their Constitution of government in any way they think proper, subject only to the express limitations set forth in that Article; that they are totally unrestricted by any implied limitations arising out of the fundamental nature of the government; and that this follows necessarily from the nature of the amending power itself as a manifestation of the sovereign will of the ultimate source of authority within the body politic.

B.—THE QUESTION OF THE EXPRESS LIMITATIONS UPON THE AMENDING POWER.

1. The Question of Equal Suffrage in the Senate.

It is contended in this case that the Nineteenth Amendment falls within the express limitation in article V, that no State shall be deprived of its equal suffrage in the Senate without its consent. This argument proceeds upon the theory that by successive amendments of a similar character the States might be deprived of all legislative power and all power to determine their own governmental structure, so that as a result the States which are guaranteed equal suffrage in the Senate would go out of existence; that this proviso in Article V necessarily implies the continued existence of the States as bodies capable of consenting—that is, as autonomous, self-governing sovereignties; that where the electorate of a State is changed through an outside medium, the State itself is changed, and has ceased to exist as the State whose continued existence is alleged to be required by the limitation in question.

This is in part the argument from the standpoint of abuse—from the consequences that might follow. As Justice Miller points out in the *Slaughter-House Cases*, cited before, such an argument is not always the most conclusive. It is indeed a very dangerous class of argument. For it is worth while pointing out that any governmental power, if carried to its extreme, is capable of leading to absurd and disastrous results; and this argument against the existence of the amending power, in the sphere which we claim for it, is equally an argument against vesting power anywhere.

It is elementary that the words of the Constitution are to be taken in their natural and obvious sense and not in a sense unreasonably restricted or enlarged; that those who framed and adopted it are presumed to have meant what they said; that debates and proceedings in the Constitutional Convention are not admissible to control the construction of the plain language of the instrument.

Martin vs. Hunter's Lessee, 1 Wheat. 304.
Gibbons vs. Ogden, 9 Wheat. 1.
Legal Tender Cases, 12 Wall. 457.

The meaning of the words used in this proviso to Article V is plain upon the face thereof. It is simply that no amendment can give a State a smaller vote in the Senate than that possessed by other States, without the consent of that State; and that no amendment can give a State a greater vote in the Senate than that possessed by other States, without the consent of all the other States.

Such an interpretation is not only that which plainly appears from the language used, but it is also the one which the history of the adoption of the proviso shows to be correct. It is a matter of historical knowledge that at the time of the framing of the Constitution, there was conflict between the delegates from the small States and those from the larger ones as to the basis upon which representation in the National Legislature should be founded; that the former desired a representation according to the States, while the latter thought it should be according to population. The result was the famous compromise by which the representation in the lower house was based on population and that in the upper according to States. It was in order to secure the principle by which each State should have the same voice in the Senate, that the proviso was adopted, and was, says Madison (The Federalist, No. 43) "probably insisted on by the States particularly attached to that equality." It is plain that it is *equality* of representation that is emphasized and that it is desired to protect; and the proviso is necessarily to be construed in connection with the struggle of the smaller States for such equality of representation in the upper branch of the legislature.

Farrand, Records of the Federal Convention, Vol. 2, pp. 629-631.
The Federalist, No. 43.

It needs no argument to show that the Nineteenth Amendment operates equally upon all the States, renders them all subject to the same limitation,—a prohibition against discrimination on account of sex in extending the vote to citizens of the United States. Their equal voice in the Senate is not interfered with in any respect. How, then, can it be said that the effect of the Nineteenth Amendment is to deprive any State of its equal suffrage so reserved to it?

2. The Question of the Alleged Express Restrictions upon the Amending Power Existing in other Parts of the Constitution.

It was further contended by those attacking the validity of the Nineteenth Amendment that the amending power is expressly limited by restrictions to be found in other provisions of the Constitution. The argument is closely allied to that which would establish implied restrictions from the nature of the Constitution, but has validity to the extent that where the spirit of that instrument may be collected from its express words, it will be given effect, although that spirit cannot be invoked as an invalidating influence except under such conditions and the clear language will always prevail.

Sturgis vs. Crowinshield, 4 Wheat. 122.
Dartmouth College vs. Woodward, 4 Wheat, 518.
Jacobson vs. Massachusetts, 197 U. S., 11.

(a)—*No Restrictions Contained in Guarantee of Republican Form of Government.*

It was contended first that such an express limitation is to be found in Article IV, Section 4, which provides that the United States shall guarantee to every State a republican form of government.

The question of whether this guaranty of the Constitution has been disregarded is not one which this Court is at liberty to consider or decide. It has been repeatedly decided that such a question is political and not judicial. It "presents no

justiciable controversy, but involves the exercise by Congress of the authority vested in it by the Constitution."

Davis vs. Hildebrant, 241 U. S., 565, 569.
Pacific States Telephone & Telegraph Co. vs. Oregon, 223 U. S., 118.
Kiernan vs. Portland, 223 U. S., 151.
Mountain Timber Co. vs. Washington, 243 U. S., 219.
Luther vs. Borden, 7 How. 1.

But even if such a question were open for determination by the Courts, it is difficult to see in what way it is violated by the Nineteenth Amendment. By a republican form of government is understood a government by representatives chosen by the people; and it contrasts on the one side with a democracy in which the people as an organized whole wield the sovereign powers of government, and, on the other side, with the rule of one man or with that of one class of men.

Cooley, Principles of Constitutional Law, Chap. XI.
Luther vs. Borden, 7 How. 1, and the argument of Daniel Webster therein.

How can it be said that government through representatives chosen by the people is in any manner interfered with by an amendment that does nothing except prohibit discrimination in the exercise of the power of voting for their representatives against a certain portion of the people?

(b) *No Restriction Contained in Ninth and Tenth Amendments.*

It is secondly contended that there is an express restriction upon the amending power to be found in the Ninth and Tenth Amendments which provide as follows:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

"The powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

"The Ninth Amendment," says Justice Story, "was manifestly introduced to prevent any perverse or injurious mis-

application of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and *e converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strongly forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of the Federalist on the subject of a general bill of rights."

Story on the Constitution, (5th ed.) Vol. 2, Sec. 1905.

So far from implying a restriction on the amending power, its effect is distinctly the opposite. Among the rights retained by the pople is the weightiest of all, the one which embraces all others,—the right to change the Constitution and to distribute governmental powers among governmental agencies. It was against just such a perverse misapplication of the maxim quoted by Justice Story as is here presented,—to wit, that, because only certain powers have heretofore been granted to the Federal Government, no others can henceforth be granted—that the Amendment operates. The Constitution vests certain governmental rights in the several States; the fact is not to be construed to deny or disparage the great right retained by the sovereign people to change their form of government in the way they have laid down. To assert the contrary is a political heresy of the first order.

> The Tenth Amendment, says the same eminent authority, "is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the Constitution. Being an instrument of limited and enumerated powers, it follows, irresistibly, that what is not conferred is withheld, and belongs to the State authorities if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as a part of their residuary sovereignty. . . . *It is plain, therefore, that it could not have been the intention of the framers of this amendment to give it effect as an abridgment of any of the powers granted under the Constitution, whether they are express or implied, direct or incidental. Its sole design is to exclude any interpretation by which other powers should be assumed beyond those which are granted. All that are granted in the original instrument, whether express or implied, whether direct or incidental, are left in their original state.* . . .

> The attempts then which have been made from time to time to force upon this language an abridging or restrictive influence are utterly unfounded in any just rules of interpreting the words or the sense of the instrument. Stripped of the ingenious disguises in which they are clothed, they are neither more nor less than attempts to foist into the text the word 'expressly' to qualify what is general and obscure what is clear and defined. They make the sense of the passage bend to the wishes and prejudices of the interpreter, and employ criticism to support a theory, and not to guide it." (Italics ours.)
>
> *Story on the Constitution*, (5th ed.) Vol. 2, Sec. 1907.

That the Tenth Amendment is not to be interpreted as placing a restriction upon the power to amend, is strikingly shown by the words of Justice Brewer, rendering the opinion of the Court, in *Kansas vs. Colorado*, 206 U. S., 46.

> "This Amendment . . . disclosed the widespread fear that the National Government might, under the pressure of a supported general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should even find justification in the organic act, *and that if in the future, further powers seemed necessary, they should be granted by the people in the manner provided for amending that act.* Its principle purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. . . . The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all the powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. *The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provisions for an amendment to the Constitution by which any needed additional powers could be granted, they reserved to themselves all powers not so delegated. This Article Ten is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning.*" (Italics ours.)
>
> *Kansas vs. Colorado*, 206 U. S., 46, 90.

The first ten amendments constitute a Bill of Rights, and it is out of the general powers of *government* that everything enumerated in the Bill of Rights is excepted, not out of powers which are not powers of *government* at all, like that of amending the Constitution. "A power of government is a power which expends itself in administering or operating the political machine established by the Constitution, not one which goes to the rebuilding of that machine itself; or to use a metaphor * * * it is a power proper not for the mill-wright, but for the miller."

> *Jameson*, Constitutional Conventions, Sec. 555, p. 586.

In *State of Ohio ex rel. Erckenbrecker vs. Cox*, 257 Fed., 334, it was urged upon the Court that the Tenth Amendment works a restriction upon the amending power; and the Court answered (p. 342):

> "Counsel do not favor the Court with decisions on this subject, but granting to the claim all that may be argued for it, it must be said that the members of the Senate and the members of the House are the representatives of the States and the representatives of the people, respectively, to whom is given the power to propose amendments to the Constitution which become such only when the representatives of the people in three-fourths of the States concur. Reserved powers are so called, because they have never been surrendered. When the requisite number of States concur, the people surrender to the United States additional power. It may be absolute, or it may be concurrent, becoming absolute only when Congress shows an intention of occupying the whole field embraced by the particular subject."

The Constitution in Article V lays down the manner in which it shall be amended. Neither the Ninth nor the Tenth Amendment changes that manner one iota. Article V stands is precisely the same form as that in which it was originally adopted, carries the same powers, is endowed with the same meaning. At any time the sovereign people could by amendment have changed it and provided a different method. As is pertinently said by the Court of first instance in this case (Record, p. 21), "the founders of the Government and their advisers * * * knew that Article and what it meant * * * and they let it stand unchanged, reserving in the provisos all they desired to reserve." The Ninth and Tenth Amendments

are rules of interpretation, nothing more; and they neither add to nor detract from the rights and powers granted under the original instrument.

C.—THE QUESTION OF THE FIFTEENTH AMENDMENT.

The plaintiffs in error in this case made no attempt in the Maryland Courts to differentiate in kind between the Nineteenth Amendment and the Fifteenth; now, however, such a distinction is attempted to be made. It is difficult to perceive any basis for it. Neither Amendment directly confers a grant of suffrage upon any class of citizens. Both operate solely to prevent discrimination in the exercise of suffrage on account of certain named things. When it is said that the Nineteenth Amendment directly confers the right of suffrage upon women, we submit simply that this is erroneous except in so far as the same observation held good for the Fifteenth Amendment.

It is true to a limited extent, and to the same extent it was true of the Fifteenth Amendment. Speaking of the latter Article, this Court has said:

> "While it is quite true . . . that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave holding States had not removed from their Constitutions the word 'white man' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, and a part of the state law, it annulled the discriminating word *white*, and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people, whether they be men or women.
>
> "In such cases this 15th Article of Amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right."
>
> *Ex parte Yarbrough*, 110 U. S. 651, 665.

When it is said that there is a distinction because in the one

amendment discrimination on account of race is provided against while in the other the prohibition is against discrimination on account of sex, we say that this is a distinction without a difference. For the principle in each case is the same—viz., a prohibition against a discrimination by the States which otherwise they were at full liberty to make.

That there is no distinction in kind between the Nineteenth and the Fifteenth Amendments we think so clear and apparent that argument on the point is unnecessary. The Court of Appeals of Maryland said very properly:

> "If . . . the Fifteenth Amendment was a valid exercise of the amending power, it is impossible to conceive that the Nineteenth Amendment was not likewise a valid exercise of that power, because it is not possible to distinguish the two in principle." (Record, page 153.)

If then the Nineteenth Amendment is invalid either because of restrictions necessarily implied upon the amending power or because it deprives the State of Maryland of its equal suffrage in the Senate without its consent in violation of the provisions of Article V itself, it is necessarily true that the Fifteenth Amendment as well, either was subject to such implied restrictions or was an amendment operating to deprive the several States of their equal suffrage in the Senate.

If validity is to be attached to the theory of the existence of implied restrictions upon the amending power; and if the Nineteenth and Fifteenth Amendments are of a class prohibited for this reason; *then neither of those Amendments were of a kind which Congress had power to propose, or which the State Legislatures had power to ratify.* For if the theory of implied restrictions means anything, it means that as to Amendments of a character such as the Nineteenth, there is an immovable bar, implied from the nature of our form of government, absolutely preventing any validity from ever attaching to them. In other words, such amendments would be unconstitutional Amendments.

It has been said:

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed."

Field, J., in *Norton vs. Shelby County*, 118 U. S. 425, 442.

No more could an unconstitutional amendment confer rights, impose duties, afford protection or create offices. In legal contemplation, such an amendment, too, would be as inoperative as though it had never been adopted. If there are implied restrictions upon the amending power, which attach to the Nineteenth Amendment, that Amendment, to be sure, is an absolute nullity. But it holds equally true that the Fifteenth Amendment is likewise so. No lapse of time, no consent presumed from long acquiescence, no absence from direct attack for many years, no consent under the duress of war conditions, could operate to vest it with validity. Now, equally as when first adopted, it is null and void; and this Court would have been constrained so to hold in *Myers vs. Anderson*, 238 U. S. 368, when for the first time a direct attack was made upon it.

The fact of the existence of the Fifteenth Amendment as an unquestionably valid part of the Constitution, is, we submit, the most effective of all arguments against the theory that there are implied restrictions upon the amending power which can be of any avail in the present case.

Upon the other hand, it is quite true, as stated in the brief for the plaintiffs-in-error, that, if the Fifteenth Amendment (and likewise the Nineteenth) be regarded as an amendment of a kind contemplated by the proviso in Article V—that is to say an amendment depriving the several States of their equal suffrage in the Senate—then it could have attained its present validity and properly become a part of the Constitution, binding upon all the States, by virtue of each and every State consenting thereto.

In this connection we submit that the following conclusions result. If the Fifteenth Amendment has received the consent of each State, as contemplated by Article V, then its present validity is at least of great persuasive force in determining the validity of the Nineteenth Amendment; and is conclusive upon the validity of the Nineteenth Amendment if neither is of a character such as to deprive the several States of their equal suffrage in the Senate. On the other hand, if the Fifteenth

Amendment became a valid part of the Constitution immediately upon its ratification by the legislatures in three-fourths of the States, its present validity is conclusive upon the validity of the Nineteenth Amendment, inasmuch as it necessarily follows therefrom that neither Amendment is of a character embraced by the proviso to Article V in question. Furthermore, if no consent, as contemplated by Article V has ever been given to the Fifteenth Amendment by even one State, it must be concluded that that Amendment (and likewise the Nineteenth) was not one depriving the several States of their equal suffrage in the Senate, since it is unquestionably valid as to every State at the present time; and that such validity on its part resulted from ratification by the legislatures in three-fourths of the States, and not from the fact of each and every State consenting thereto.

We do not propose to make further argument upon the point that neither of these two amendments are of a character such as to deprive the several States of their equal suffrage in the Senate. What we have previously submitted in that connection as to the Nineteenth Amendment applies as well to the Fifteenth. We say only that the proviso in Article V is to be construed according to the plain meaning of its words; that under such a construction it means simply that each State shall be equally represented in the Senate; and that an amendment which operates uniformly upon all the States cannot be regarded as depriving any one of them of its equal suffrage in the Senate.

What, however, was the actual situation with respect to the adoption of the Fifteenth Amendment? And in what way can the consent of a State be given to an amendment which deprives it of its equal suffrage in the Senate?

When the Fifteenth Amendment was proclaimed as part of the Constitution by the Secretary of State of the United States on March 30, 1870, it had been ratified by only twenty-nine out of thirty-seven States. That it did not receive universal consent is a matter of history. In Maryland, the consent of the State was expressly refused and by a joint resolution of the Maryland Senate and House of Delegates it was resolved "That the Legisature of this State hereby reject the said Fifteenth Article proposed as an amendment to the Constitution of the

United States, and on behalf of the State of Maryland, refuses to ratify the same."

Acts of 1870, page 931, Joint Res. No. 8.

No express ratification of that amendment has in fact ever been had by the Maryland legislature. Unless Maryland has given its consent, it follows either that the Amendment is even now of no force in Maryland, which is naturally eliminated; or that the amendment did not deprive Maryland of her equal suffrage in the Senate.

We submit that consent by a State to an amendment to the Federal Constitution depriving that State of its equal suffrage in the Senate can only be given in the same way that it is given to other amendments under Article V. Only two methods of ratifying Amendments are provided in the Article; it follows that only those two methods are to be used for all amendments covered by the Article. It has been recently held, in fact, as to the Nineteenth Amendment, that it could not be ratified by a referendum vote of the people of a State, but only by the legislature of the State or by a convention called for the purpose as one or the other mode of ratification may be proposed by Congress.

Hawke vs. Smith, 253 U. S. 231.

Grant that for which plaintiffs-in-error contend, viz., that the Nineteenth Amendment is one depriving the several States of their equal suffrage in the Senate; and we have here a decision that such an amendment can only be assented to in any State in one of the two ways provided in Article V. And if this be true, then in Maryland and other non-ratifying States, the Fifteenth Amendment has not been consented to and is not valid, for it likewise deprived those States of their equal suffrage in the Senate.

Such a conclusion is, of course, not to be considered, and the only alternative is that the Fifteenth Amendment did not deprive those States of their equal suffrage, this necessarily being true as to the Nineteenth Amendment as well; in consequence of which the Fifteenth (and likewise the Nineteenth) became a valid part of the Constitution upon its ratification by the legislatures in three-fourths of the States.

Plaintiffs-in-error contend, nevertheless, that consent may be given (and in the case of the Fifteenth Amendment had been given) by a State to an amendment depriving it of its equal suffrage in the Senate through general acquiescence on its part, irrespective of the fact that no formal ratification has been made by it. The element of uncertainty and confusion which such a theory would introduce is apparent and should be sufficient to condemn it. How long must such acquiescence continue? How is it to be manifested? How is one to know when the State has given its consent? When does the Senate become estopped from denying the force of an amendment to which it has not expressly consented?

It is surely significant that this Court in 1876 in *United States vs. Reese*, 92 U. S. 214, regarded the Fifteenth Amendment as in force, not in those States only which had ratified it, but everywhere, saying (page 217):

> "It prevents the States, or the United States, from giving preference, in this particular to one citizen of the United States over another, on account of race, color or previous condition of servitude. Before its adoption this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this Amendment there was no constitutional guaranty against this discrimination; now there is."

It is surely significant that, only eleven years after the adoption of the Fifteenth Amendment, this Court said of its effect upon the Constitution of Delaware—a state which had not ratified the amendment and taken no active steps to signify its consent thereto—and which Constitution still contained a provision limiting the right of suffrage to free white male citizens (as does the Constitution of Maryland to this day):

> "Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution or render inoperative, that provision which restricts the right of suffrage to the white race."
>
> *Neal vs. Delaware*, 103 U. S. 370, 389.

In the period of eleven years, in the period of six years even, the Fifteenth Amendment had become operative in States which had never expressly assented to it. If, as plaintiffs-in-error contend, it became operative, not through ratification by three-fourths of the State Legislature, but through an implied acceptance in all the States, such acceptance was presumed in a very short period of time; indeed not so much from lapse of time, but from any acts consistent with assent on the part of the State, such as the holding of elections in which negro voters were not only permitted to participate, but protected by State laws in doing so.

If this be sufficient consent on the part of the State, then Maryland has given its consent to the Nineteenth Amendment; for not only have elections been held in which women have participated, but the laws of the State have been amended in order to make provision for such participation.

At a special session called by the Governor of Maryland in 1920 the following act was passed, effective September 22, 1920:

> "An act to afford adequate facilities for the women of Maryland to exercise the right of suffrage granted by the Nineteenth Amendment to the Constitution of the United States by
>
> "A. Adding two new sections to be known as Sections 23-A and 34-A to Article 33 of the Annotated Code of Maryland, title 'Elections,' the same providing for two additional registration days in Baltimore City and in the Counties in the year 1920.
>
> "B. Adding a new section to be known as Section 127-A to said Article 33, the same directing Boards of Supervisors of Elections in the Counties and authorizing the Board of Supervisors in Baltimore City to establish an additional polling place in precincts or election districts in which more than 800 persons are registered.
>
> "C. Amending Section 31 of said Article 33, so as to provide that the Board of Registry in the Counties shall hold a session from nine o'clock A. M. to nine o'clock P. M.
>
> "D. Amending Section 63 and repealing Section 63-A and 63-B of said Article 33, so as to provide that the polling places throughout the State shall open at six A. M. and shall close at seven P. M.
>
> "E. Amending Section 17 of said Article 33, so as

to provide for cases of women claiming citizenship by marriage, and for the recording of the sex of applicants for registration.

"F. Amending Section 6 of said Article 33, so as to increase the clerical force of the Supervisors of Elections, of Baltimore City, and providing compensation therefor.

"G. Adding a new section to said Article 33 to be known as Section 118-A, so as to increase the compensation of judges and clerks of elections and registration officials.

"H. Providing for the payment of expenses incurred under the provisions of this Act.

"I. Extending the application of said Article 33 so as to include the feminine gender."

By Section 7 of the Act, Article 33, Section 17 of the Maryland Code dealing with the proceedings of Boards of Registry, was amended as follows:

"In the case of a woman who claims citizenship by marriage, the Board shall note the same of the person to whom married and where and in what court he was naturalized, or where previously registered. Under the column headed 'Remarks' they shall note whether applicant is male or female."

By Section 11 of that Act, a new section was added to Article 33 of the Maryland Code title "Elections," known as Section 1-A and reading:

"Whenever in this Article words or phrases are used denoting the masculine gender, they shall be taken to include the feminine gender."

We submit that Maryland has consented to the Nineteenth Amendment as fully as ever she assented to the Fifteenth.

Plaintiffs-in-error also argue that the conditions under which reconstruction was accomplished after the Civil War removed the question of consent from the realm of judicial decision; and say that "the consent yielded by the seceding States to the so-called War Amendments was as conclusive upon this Court, as the inevitable result of a great war, as if it had been spontaneously granted by free legislatures in times of peace." Apparently this is to hold true as well of non-seceding States, such as Maryland and Delaware, which did not ratify; and

in spite of the fact that Maryland expressly refused to assent to the Amendment. Such a statement, if true, would, of course, mean that the Fifteenth Amendment was never in need of ratification by any of the States, but that their consent was implied, as the inevitable result of the Civil War. We are unable to perceive how the Fifteenth Amendment could have ever attained validity in such a manner.

It is true indeed that in the Slaughter-house Cases, Justice Miller points out that the underlying purpose of the Thirteenth, Fourteenth and Fifteenth Amendments was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freemen and citizens from the oppressions of those who had formerly exercised unlimited jurisdiction over him." They were adopted to secure one of the purposes for which the Civil War was fought—to wit, the abolishing of slavery. They were, nevertheless, amendments to the Constitution and could have no validity except as viewed in that light. That even after the Civil War, Congress had no power, except under power conferred by an amendment to the Constitution, to abolish slavery or enfranchise the negro, is necessarily implied from the language of the Superior Court in *White vs. Hart*, 13 Wall., 464. In that case, in construing the provision of the Constitution of Georgia of 1868, which provided that no court or officer should have jurisdiction to try, or give judgment on or enforce any debt the consideration of which was a slave or the hire thereof, and holding the same to be regarded as the voluntary act of the State, the Court took special occasion to say:

> "If Congress had expressly dictated and expressly approved the proviso in question, such dictation and approval would be without effect. Congress has no power to supersede the national Constitution."
>
> *White vs. Hart*, 13 Wall., 646, 649.

If Congress had no power under the Constitution to dictate such a proviso, it had no power to enfranchise the slave, which was fully as much an incursion into the rights of the States. It was not until expressly granted the power by a duly proposed and ratified amendment to the Constitution that it could so act. The Fifteenth Amendment, as Justice Miller points out in another part of his opinion had the effect of imposing addi-

tional limitations upon the State governments and conferring additional power upon the national government; it partially redistributed the powers of government laid down by the original Constitution and was necessarily therefore an amendment of that instrument.

Furthermore, in order to have any validity, it must have been an amendment proposed and ratified in the authorized way and not by a fiat of Congress. Those who raise the contrary argument are placed in the strange position of at one and the same time denying that even the sovereign people, through their duly appointed agents, cannot amend their form of government so as to work a fundamental redistribution of power therein; and yet asserting that a governmental agency can, in an entirely unauthorized manner, validly do that very thing forbidden to the sovereign. The Fifteenth Amendment was proposed by two-thirds of both Houses of Congress. It was ratified by the legislatures of three-fourths of the States. It is true that as to some of those States, the ratification by their legislatures was demanded by Congress as a condition precedent to their being granted back their representation in Congress. The authority of Congress to impose such a condition is constitutionally doubtful. But the character of those ratifications as voluntary and valid offerings is not judicially cognizable, nor can the action of Congress in accepting them as such be inquired into.

White vs. Hart, 11 Wall. 646, 649.
Willoughby on the Constitution of the United States, Vol. I., p. 523.

The conclusion, we respectfully submit, is irresistible that the Fifteenth Amendment was a valid exercise of the amending power, properly proposed and ratified by the legislatures in three-fourths of the States, dependent for its validity upon such ratification only, and in effect from the date of its adoption; and this conclusion is only strengthened by absence from direct attack for over half a century. Only according to such a view could it ever attain validity; for, as has been elsewhere pointed out, the sovereign people possess the inherent right to amend their constitution of government in any manner and to any extent, but where they have prescribed the way in which such amendment is to be made, they must follow the method

so laid down. And the Nineteenth Amendment, if duly proposed and ratified in proper manner, is governed by the Fifteenth, and has likewise become "valid to all intents and purposes" as part of the Constitution of the United States, part of the supreme law of the land binding upon the Courts in every State, "anything in the Constitution or laws of any State to the contrary notwithstanding."

D. THE EIGHTEENTH AMENDMENT.

The validity of the Nineteenth Amendment, so far as its subject matter is concerned, is even further supported by the recent decision of this Court in *Rhode Island vs. Palmer*, 253 U. S., 330, holding the Eighteenth Amendment within the power to amend. It is indeed argued that the fact that the Supreme Court took under its consideration the validity of the Amendment constituted a statement on their part that the amending power is not unlimited and that an amendment might conceivably be beyond that power. Inasmuch as the character of amendments that may be proposed by two-thirds of both Houses of Congress and ratified by three-fourths of the Legislatures of the several States is expressly limited in Article V, so as to exclude certain classes of amendments, amendments that would affect the equal suffrage of the States in the Senate—for which another mode of adoption is prescribed—it is submitted that the holding of the Court means simply that it will assume to itself the power and duty to examine any proposed Amendment in order to ascertain whether it falls within the class which may be proposed and ratified as the Eighteenth Amendment was.

In any event, the Court held the Eighteenth Amendment to be of a kind and character fully within the amending power, saying:

> "4. The prohibition of the manufacture, sale transportation, and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by Article V of the Constitution.
>
> "5. That Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument."
>
> *Rhode Island vs. Palmer*, 253 U. S., 350, 386.

The decision of the Court on this point was unanimous. Justice McKenna, in his dissenting opinion, says that the above two conclusions "seem to assert the undisputed;" and further says, (p. 401):

> "The Eighteenth Amendment is part of the Constitution of the United States, therefore as of high sanction as Article VI. There seems to be a denial of this, based on Article V. That article provides that the amendments proposed by either of the ways then expressed 'shall be valid to all intents and purposes as part of this Constitution.' Some undefinable power is attributed to this in connection with Article VI, as if Article V limits in some way, or defeats an amendment to the Constitution inconsistent with a previously existing provision. Of course, the immediate answer is that an amendment is made to change a previously existing provision. What other purpose could an amendment have, and it would be nullified by the mythical power attributed to Article V, either alone or in conjunction with Article VI. A contention that ascribes such power to those articles is untenable. The Eighteenth Amendment is part of the Constitution and as potent as any other part of it."

In spite of the fact that the decision of the Court states only "ultimate conclusions, without an exposition of the reasoning by which they have been reached," nevertheless those conclusions become of great and controlling significance in the present case. *For every point that is raised against the validity of the Nineteenth Amendment was raised against that of the Eighteenth.*

It was argued in *Rhode Island vs. Palmer* that an amendment under Article V must, by the meaning of the word "amendment" be a change consistent with the nature and purpose of the Constitution, to extend only to the correction of errors committed in drafting that instrument, implying an addition or change within the lines of the original instrument that would effect an improvement or better carry out the purpose for which it was framed; and that this implied restriction as to scope was embodied in the meaning which was attached to the word "amendment" by Madison and the other framers of the Constitution.

It was further argued in that case that the fundamental purpose of the framers was to establish "an indestructible union of indestructible States;" that they did not intend to

restrain the States in the regulation of their civil institutions adopted for internal government and the Constitution is to be so construed; that the power of the States to regulate their purely internal affairs by such laws as seemed wise to the local authority is inherent and has never been surrendered to the general government; that the right of a State to have whatever means or instrumentalities of local government as it deems fit and its right to enact measures of local self-government in accordance with its own peculiar wishes were wholly reserved to the States under the Tenth Amendment; that the right of the States to continue as effective local governments was implied in the Constitution and upheld as against the practically unqualified grant of the Federal taxing power in *Collector vs. Day* and other cases.

It was argued in that case that the founders of the government intended that it should ever be a true Federal system, constituting a Union of free and independent States, each possessed of distinct and substantial autonomous and self-governing power as to its own people and its own local self-government, and not a single, consolidated centralized government in which the several States were to be but forms of municipal corporations of the central government or mere geographical divisions; that the establishment and recognition in the Constitution of the two governments, Federal and State, plainly implies that neither shall be permitted to destroy the other. Many authorities were cited and it was argued at length to the effect that the right of a State to have and exercise its power of internal police was the breath of its being, without which it was nothing but a name. It was pointed out that the Eighteenth Amendment opened the way for future amendments which could deprive the State of every right of local self-government.

It was argued in that case that the express proviso of Article V, that no State without its consent shall be deprived of its equal suffrage in the Senate, necessarily implies and requires the continued existence of the States as bodies capable of consenting, which it was claimed was synonymous with their continued existence as autonomous self-governing sovereignties; that otherwise, by stripping them of their various powers they could be in effect destroyed and their equal suffrage in the Senate with them.

It was argued in that case that the Eighteenth Amendment was an act of "legislation" by the Federal government in a field prohibited to it—and it is obvious that this objection applies with far greater strength to the Eighteenth than to the Nineteenth Amendment—and as such could not find expression by way of constitutional amendment.

Against these arguments the upholders of the Eighteenth Amendment raised the points that no restrictions upon Article V could be implied from any provision of the Constitution or from the nature of the Constitution itself; that all that existed were found in Article V itself; and that under these no restraint was to be found upon the power of amendment that would prevent it from extending the power of the Federal Government to subjects formerly under the exclusive control of the States. They are the same arguments which we urge upon this Court in the present case.

The only reason urged in support of the proposition that the arguments which proved futile against the validity of the Eighteenth Amendment, should yet prevail against that of the Nineteenth, is that the latter directly affects the fundamental governmental functions of the several States while the former does not. We submit that the reason is not founded upon fact, and that it cannot be properly said that the Eighteenth Amendment does not, partially at least, take away or diminish from the State any such power or function. No more fundamental governmental function can be conceived than that of raising revenue for the carrying on of the governmental organization. Prior to the Eighteenth Amendment this could be done—and was done—in part through a system of liquor licensing; now that means is at least seriously curtailed in every State of the Union.

However that may be, the unquestionable result of the decision in *Rhode Island vs. Palmer* was to hold it proper, by constitutional amendment, to work a redistribution of governmental power under the Constitution, to vest in the Federal Government the right to interfere in matters theretofore exclusively left to the several States irrespective of their policies and laws, and to establish a precedent for the adoption of other amendments in future that might conceivably take all power of self-regulation and government from the several States.

E. SUMMARY.

We respectively submit that the Nineteenth Amendment was a valid exercise of the amending power under the Constitution and is to be respected as such. The framers of the Constitution, in prescribing the method to be used in amending that instrument, endeavored to establish a way in which it could be altered to meet changed conditions and circumstances while at the same time to guard against instability from light or frequent innovations. They sought to make changes practicable, but not too easy; to guard "equally against that extreme facility which would render the Constitution too mutable and that extreme difficulty which might perpetuate its discovered faults."

> *Story on the Constitution* (5th ed.), Vol. 2, Sec. 1827.
> *The Federalist*, No. 43.

They thought that the two methods which they prescribed—to neither of which incidentally does any authority ascribe a superiority over the other—were calculated to accomplish that purpose. For more than a century all commentators have held that they calculated well; that if they erred at all, it was on the side of too great difficulty of amendment. Only very recently has the criticism been raised that the danger lies in the facility of the exercise of the amending power. Assuming the truth of such criticism, and the way for correction lies open. But it is not by judicial limitation of a power inherent in sovereignty; it lies, and lies only, in a change in the method of adopting amendments, which can be made by the sovereign people in the manner they have prescribed, and by the sovereign people alone.

III.—THE FORMAL AND ACTUAL RATIFICATION OF THE NINETEENTH AMENDMENT.

The second contention of the Appellants in this case is that the Amendment, even if a proper one, has never in fact been properly and formally ratified by a requisite number of State Legislatures. We answer: (1) That this Court cannot inquire into the facts which are called into question; but (2) if the Court makes such inquiry, it will find that a sufficient

number of State Legislatures have formally and properly ratified the Amendment.

A. THE BINDING EFFECT OF THE OFFICIAL CERTIFICATES OF RATIFICATION.

We submit that this Court is bound by, and cannot go behind, the resolutions of the State Legislatures ratifying the Amendment, the official notifications by the Governors of those States to the Secretary of State of the United States, and the proclamation of the Secretary of State declaring that the Amendment has become a part of the Constitution. We make this point upon the ground that such ratification and certification constitute political acts which are not subject to judicial review.

It is a fundamental principle of the American system of written constitutional law that all the powers entrusted to governments, whether State or National, are divided into the three departments of the executive, the legislative and the judicial. It is essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others.

Kilbourn vs. Thompson, 103 U. S., 168, 190.

It is undeniable that "the action of the political branches of the government, in a matter that belongs to them, is conclusive." *McLean, J., in Williams vs. Suffolk Ins. Co.*, 13 Pet., 415, 420, citing *Foster vs. Neilson*, 2 Pet., 243, 307.

No comprehensive enumeration of these political determinations has ever been attempted by the Courts, nor would it, by its nature, be possible. They comprehend among others, the existence and territorial extent of the sovereignty of the United States or of foreign States; the *de jure* character of their governments; questions as to the existence of war, belligerency and neutrality; whether a treaty or other international agreement is in force. We submit that they comprehend also the question as to whether an Amendment to the Constitution of the United States declared to have been ratified by a State legislature, and bearing the official attestations of the pre-

siding officers of that legislature and of the Chief Executive of the State, has, as a matter of actual fact, been so ratified.

The test as to whether any particular question is to be regarded as political is, we submit, that laid down by Justice Story in *Martin vs. Mott*, 12 Wheat. 19, 31, as follows:

> "Whenever a statute gives a discretionary power to any one person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."

That is to say, if a discretionary power is granted to the political branch of the government, that branch is thereby constituted the sole and exclusive judge of the necessity of its exercise and whether it has been properly exercised.

In the present case, it is a question of the ratification of a proposed amendment by the Legislatures of certain States. They were vested by Article V of the Constitution of the United States with discretion as to whether they should ratify that amendment; and they must be the sole and exclusive judges as to whether they have in fact so ratified it. It is contended that the Legislatures of West Virginia and Tennessee did not validly ratify because of non-compliance with the rules of those bodies in the proceedings. The Legislatures of those two States are empowered by the State Constitutions to formulate and adopt rules of parliamentary procedure; those rules are not laid down by the laws or constitutions of the State. Whether they have been complied with is therefore a question purely for the decision of the Legislatures themselves,—not for the Courts. Indeed it is a well established principal, resulting from the principle of the separation of powers, that the Courts will not inquire into such questions as the credentials of one claiming membership in a legislative body, or to prescribe the rules by which such bodies are governed. To hold otherwise would be an infringement by the judicial branch upon the powers of independent and equal branches of the government.

In a case previously referred to on another point, it was said, with respect to a provision of the Georgia Constitution of 1868 offered to Congress in compliance with the conditions

imposed upon the regaining by that State of its representation in the National Legislature:

> "The result was submitted to Congress as a voluntary and valid offering, and was so received and recognized in the subsequent action of that body. Upon the same grounds she might deny the validity of her ratification of the constitutional amendments. The acting of Congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government and is concluded by it."
>
> *White vs. Hart*, 13 Wall. 646, 649.

In *Georgia vs. Stanton*, 6 Wall. 50, it was said that "the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all the constitutional powers and privileges" constituted political rights, the question of whose infringement was not one for the decision of the judicial branch of government, since no case of infringement, actual or threatened, of private rights or private property was presented.

We submit, therefore, that the validity of the ratification *vel non* by a State Legislature of an amendment to the Constitution is a political question, constituting as it does an act of sovereignty by the agent in whom the right is vested, and affecting no private rights or property.

It was asked what remedy is available if the legislative and executive branches act in disregard of the actual facts. That point was raised in both the cases of *Martin vs. Mott*, supra, and *Luther vs. Borden*, 7 How. 1. In the former case, the question was with respect to the authority to decide whether the exigencies contemplated in the Constitution and the Act of 1795, ch. 101, as to calling forth the militia, had arisen; it was held that the power of decision was vested in the President exclusively, and his action could not be inquired into by the Courts. The Court says, by Story, J. (Page 32):

> "It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue and honest de-

> votion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation of wanton authority."

In other words, should the President have called forth the militia in a time of absolute peace and quiet, contrary to the purpose of the Constitution and the Act of 1795, nevertheless *there would be no remedy against such usurpation of power on his part through the courts.*

To the same effect is *Luther vs. Borden*, 7 How., 1, 44.

It is claimed in this case that the Court may go behind the passage of the joint resolution ratifying the Amendment in Tennessee and West Virginia, and decide from the journals of the Houses in those States whether the resolutions in question were actually passed. This we deny. In *Field vs. Clark*, 143 U. S., 649, a similar contention was made that the Court could look behind an enrolled bill and determine, from the congressional records of proceedings, reports of committees and other proceedings, whether the bill as passed differed from the bill authenticated by the signatures of the presiding officers of both houses and of the President; the contention was denied, the bill as authenticated held binding upon the courts as to the form in which it was passed, and the House Journals, though required by the Constitution to be kept, held not to be open for investigation in judicial proceedings. The Court says, by Harlan, J., (page 672):

> "The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such a bill as one that passed Congress. It is a declaration by the two houses, through their presiding officers, to the President that a bill, thus attested, has received in due form the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, has received his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State, and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the Presi-

> dent of the United States, carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively with the duty of enacting and executing laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept as having passed Congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."

In the recent case of *State of Ohio, ex rel Erckenbrecher vs. Cox*, 257 Fed., 334, the point was raised that the Eighteenth Amendment was never in point of fact approved by the required proportion of the membership of Congress. The Court says, by Hollister, D. J., (page 345) after citing *Field vs. Clark*:

> "There is ground for holding that as against such a certificate as is involved here (i. e. the certificate of passage of the Eighteenth Amendment by Congress) *the Court cannot enter into an inquiry as to the make-up of either house at the time the vote was taken* * * *." (Italics and parenthesis ours.)

In the case of *Lyons vs. Woods*, 153 U. S., 649, it was held that the courts of New Mexico could not go behind enrolled bills whose passage was duly attested, and which were duly approved, placed in the propery depository, and duly certified to and published as laws; and could not hold them void upon the ground that certain members of the quorum of one of the two bodies by which they were passed were seated without having certificates of election. In that case it was argued that certain acts had never actually passed, on the ground, as contended in the present case, that at the time of their passage a legal quorum never voted in their favor.

To the same effect is *Harwood vs. Wentworth*, 162 U. S., 547.

We very earnestly urge that the act of ratification of a proposed Amendment to the Federal Constitution is a purely political act or function—that is, an act or function committed exclusively to the political branches of government. And it has been held many times by the Supreme Court, that the action of a political branch upon a purely political question is binding and conclusive upon the judicial branch, whether such

action be right or wrong. See, e. g., *Williams vs. Suffolk Ins., Co.*, 13 Pet., 415, 420.

B.—THE REQUISITE NUMBER OF STATE LEGISLATURES HAVE, IN FACT, RATIFIED THE NINETEENTH AMENDMENT IN DUE FORM.

But even assuming that the question of the actual ratification proceedings in the several States is one which this Court may inquire into, we then contend that those proceedings were, in fact, proper and that the Amendment was duly ratified in those States. The ground of attack upon those proceedings may be placed under two heads, viz.: (1) Limitations upon the power of the Legislature to act upon the Amendment in the Constitutions of certain named States; (2) Irregularities in the adoption of the resolutions of ratification in Tennessee and West Virginia.

1.—The Restrictions in the State Constitutions.

The State constitutional provisions in question, with the exception of a provision by which a Tennessee legislature elected prior to the submission of a proposed constitutional amendment to the United States Constitution is forbidden from acting thereon, are claimed to forbid ratification by the States in question of an amendment such as the Nineteenth.

But we assert that under the recent decision of the Supreme Court in *Hawke vs. Smith*, 253 U. S., 221, the provisions of the State Constitutions relied upon are absolutely without effect or binding force.

The case arose in the following manner. In December, 1917, Congress proposed to the several States the Eighteenth Amendment. This was ratified by the General Assembly of Ohio, January 7, 1919; forwarded to the Secretary of State of the United States, January 27, 1919; and proclaimed adopted January 29, 1919. The Constitution of Ohio, adopted by a vote of the people in November, 1918, contained this provision:

> "The legislative power of the State shall be vested in a General Assembly, consisting of a Senate and House of Representatives, but the people shall reserve to themselves the power to propose to the General Assembly laws and amendments to the Constitution, and to adopt or reject

> the same at the polls on a referendum vote, as hereinafter provided. *The people also reserve to themselves the legislative power or the referendum on an action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.*" (Italics ours.)

It was proposed to submit the action of the General Assembly on the Eighteenth Amendment to such a referendum, and this case was brought to enjoin the Secretary of State of Ohio from preparing the ballots and expending the public money to hold the referendum election. The Ohio Courts sustained the demurrers to the petition and dismissed it; and the case was then carried to the Supreme Court of the United States.

The Supreme Court reversed the decision of the Ohio Courts and held that the State of Ohio had no power or authority to require, by its Constitution, the submission of a proposed Federal Amendment to a referendum vote of the people of that State. The Court says, by Day, J.:

> "It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented."

In other words, while the power of the State to enact laws and amend the State Constitution is derived from the people of the State and may be limited or restrained by provisions of the State Constitution, the power to ratify a proposed Amendment to the Federal Constitution, having been derived from the Federal Constitution itself, or more properly, from the whole people of the United States through that instrument, is to be limited only by the Federal Constitution. The power in the State Legislatures to ratify proposed Federal Amendments coming entirely from one source, it cannot be limited as to its exercise by another. The State Legislatures, in carrying out such ratifying power, act, not as the agents of their several States, but as the agents of the people at large.

See also *Dillon vs. Gloss*, 256 U. S.—(decided May 16, 1921).

They are governmental agencies of the United States, representing the sovereign power of the nation in the exercise

of an inherent right of sovereignty and are not to be controlled in the field granted to them by the acts of other governmental agencies of the same sovereign power. No more than the State of Maryland, through the taxing power, could indirectly control the instrumentality of Federal Government represented by the United States Bank, can the States of Tennessee and Missouri directly control the instrumentalities of National Government represented by the State Legislatures when ratifying an amendment to the Constitution of the United States.

McCulloch vs. Maryland, 4 Wheat., 316.

It follows as a result that the restrictions placed upon the ratifying power by the constitutions of Missouri and Tennessee are utterly void and of no effect. Those States by their constitutions can no more tie the hands of their legislatures in acting upon a proposed amendment to the Constitution of the United States than the State of Ohio, by its constitution, could tie the hands of its legislature by subjecting its action to a referendum vote of the people of the State.

The case of *Hairr vs. Rice*, 204 U. S. 291, is relied upon in opposition to this. That case is clearly distinguished from the present one; it arose out of the following facts. By the enabling act of Congress admitting Montana and other States to the Union certain lands were granted to those States, to be held, appropriated and disposed of for certain purposes, viz.: the establishment of various educational institutions, in such manner as the legislatures of the various States should severally provide. The Constitution of Montana provided for the investment of the funds of said educational institutions, and that the interest from the invested funds should be used for the maintenance of those institutions; the right to use the principal for that purpose was denied. The legislature nevertheless attempted to use part of the principal, and the Supreme Court followed the decision of the State Court to the effect that it could not do this, being bound by the provisions of the State constitution. The position was taken in argument that the legislature was acting as the agent of the Federal government and not of the State, that the State had nothing to do with the lands in question, and could not limit the action of the legislature. In opposition to this the argument was made that the grant of land was made to the State, which thereupon owned those lands, without condition or restriction, and could of

course in consequence, either by constitutional provision or legislative enactment, place restrictions upon the use of the funds derived from them. This latter argument was upheld by the Supreme Court, which said, by Moody, J. (page 300):—

> "It is vitally necessary to the conclusion reached by these arguments (i. e. that the legislature was the agent of the United States and not to be bound by State constitutional restrictions) that the enabling act should be interpreted as constituting the legislature as a body of individuals, and not as a parliamentary body, the agent of the United States. But it is not susceptible of such an interpretation. It granted the lands to the State of Montana, and the title to them, when selected, vested in the grantee." (Parenthesis ours.)

In other words, the holding in *Haire vs. Rice* was that the legislature was not acting as agent for the United States, but for the State itself. In the present case, where it is a question of ratifying a proposed amendment to the Federal Constitution, it is decided by the case of *Hawke vs. Smith* that the legislatures of the several States act, not as agents of the people of their respective States, but as agents of the whole people of the country, under the United States Constitution. We submit therefore, that the case of *Haire vs. Rice* has no bearing upon the present question.

2.—The Irregularities in the Ratifying Proceedings.

(a) *In Tennessee.*

The proceedings in Tennessee were, briefly, as follows: The Senate adopted the resolution of ratification on August 13, 1920 by a vote of 25 to 4, (Record pages 67, 120) a quorum being present. On August 18, 1920, the resolution was taken up in the House of Representatives, and a motion to lay the resolution on the table was lost by a vote of 48 to 48 (Record, pages 73, 124). Subsequently a vote was taken on the passage of the resolution, and the same was passed by a vote of 50 to 46, (Record, pages 74, 125); a motion to reconsider was then made, but before action was taken thereon a number of representatives left the State. On August 21, 1920, the motion to reconsider was taken up, and was defeated by a vote of either 49 or 50 to 0 (Record, pages 77, 128) nine members being present but not voting; this was after the house had overruled a decision of the chair to the effect that the motion

to call from the Journal the motion to reconsider was out of order for lack of a quorum, the vote being 49 to 8 against the chair, one member not voting. (Record, pages 76, 127.). Certification of the ratification of the Amendment was then sent by the Governor to Washington. Subsequently it is alleged that the House again took up the motion to reconsider and adopted it by a viva voce vote, afterwards reconsidering the resolution of ratification and defeating it by a vote of 47 to 24, twenty members being present but not voting. (Record, page 137). By the Constitution of Tennessee, a quorum for each House is fixed at two-thirds of its membership, which is 66 for House of Representatives. (Record, page 27.)

It is claimed that the motion to reconsider had the effect of estopping final action on the resolution to ratify until disposed of; and that it was not disposed of on August 21, because of the absence of a quorum. We answer as follows:

In the case of *Hawke vs Smith*, 253 U. S. 221, it was held that the act of ratification by a State legislature is not an act of legislation within the proper sense of the word. It follows as a result that the parliamentary procedure adopted by State legislatures in accordance with provisions of their State constitutions,—in this case the effect of the motion to reconsider—does not apply and does not govern the acts of those bodies when passing upon a proposed Federal Amendment; for those rules were adopted to govern those bodies in legislation and should not be stretched to govern their actions in other respects.

The situation is very analagous to that presented in the early case of *Hollingsworth vs. Virginia*, 3 Dall. 378, which had to do with the Eleventh Amendment. The Constitution, Article I, sec. 7, declared that every order, resolution or vote to which the concurrence of the Senate and House of Representatives should be necessary, should be presented to the President of the United States, and before the same should take effect, should be approved by him, or if disapproved, repassed by two-thirds of the Senate and House of Representatives. A proposed Amendment would have seemed to have fallen within this class, requiring, as it does, the concurrence of the two Houses; and therefore to be without effect and improperly submitted to the States without the action of the President. Nevertheless

it was held to the contrary, on the ground that such a proposed amendment was a purely substantive act, unconnected with the ordinary business of legislation.

The case of *Davis vs. Hildebrant*, 241 U. S., 565, is clearly distinguished in *Hawke vs. Smith*, 253 U. S., 221, in which the Court says (at page 231):—

> "Such legislative action (as involved in that case) is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression, no legislative action is authorized or required."

We submit that, inasmuch as it is held by *Hawke vs. Smith*, that the action of the State legislatures on a proposed constitutional amendment consists only and wholly of the expression by them of their assent or dissent to the measure before them, the House of Representatives of Tennessee, in the original vote of August 18th, did express its assent to the ratification of the Nineteenth Amendment; for a majority of the whole membership of the House signified its assent to such ratification at that time, a quorum being present.

It is well settled, and is not denied in this case, that when a proposed constitutional amendment is once ratified by a State legislature—bearing in mind the words of the Supreme Court in *Hawke vs. Smith* to the effect that by ratification is meant the signifying of the assent of the State legislature merely—this action on their part is final and cannot be reversed or modified later.

> *Willoughby*, Constitutional Law, Vol. I, p. 521.
> *Opinion of the Justices*, 118 Me. 544, 107 Atl. 673.

The power of the State Legislatures to participate in amending the Federal Constitution exists only by virtue of a special grant in the Constitution. The power cannot be enlarged by implication but must be strictly pursued. So when a State legislature has done the act or thing which the power contemplated and authorized (i. e., when it has expressed its assent)—when the power has been once exercised—it *ipso facto* ceases to exist.

> *Jameson*, Constitutional Conventions, Sec. 583.

When the Tennessee House on the first vote, passed the resolution of ratification, we submit that it thereby signified its assent to the Amendment; that its power had been exercised and become final; that no subsequent action on its part to reconsider or reverse its former action could be of any legal effect or force; but that being the thirty sixth State to ratify, the Nineteenth Amendment became from that minute a part of the Constitution of the United States.

Dillon vs. Gloss, 256 U. S. (Decided May 16, 1921.)

(b) *In West Virginia.*

The proceedings in West Virginia were briefly as follows: The resolution to ratify the Nineteenth Amendment was voted upon in the Senate on March 1, 1920, and was defeated (Record, page 89); a motion to reconsider was also made and defeated, (Record, page 96). Subsequently a similar resolution was introduced in the House of Delegates, passed by that body, (Record, page 105) and then sent to the Senate for action (Record, pages 105, 97). The latter passed this resolution by a vote of 15 to 14, (Record, page 102) and a certificate of the passage of the resolution ratifying the amendment was forwarded to Washington by the Governor.

Senate Rule 52 provides in effect that when a resolution has once been passed upon, and a motion to reconsider disposed of, the same resolution cannot be presented or acted upon a second time during the session (Record, page 106). It is claimed that by the operation of this rule, the Senate was precluded from acting upon the resolution sent over by the House, and its action thereon was of no effect.

We submit that for reasons analagous to those which we have stated in the case of limitations imposed by State Constitutions, such a rule can have no effect in the case of action upon a proposed amendment to the Federal Constitution. But without this, we think it clear that the rule has no application in the instant case.

The meaning and intent of this rule is very obvious and the rule itself a very usual one. It is to prevent the clogging of business by the continued re-introduction and re-consideration of bills that have once been passed upon. It is not enforceable

against a bill coming from the other House, because the judgment of each House is obligatory upon, and affects only, the introduction of bills by its own members; this is the necessary result of the equality of standing of the two Houses. The effect and interpretation of, as well as the exceptions to, a rule of this character are clearly set forth by Cushing in his work on "*Law and Practice of Legislative Assemblies*", in Chapter Nineteen. With respect to the question here presented, the conclusion which we submit above is fully sustained, as follows (p. 896):—

> "2314. The judgment of one house being obligatory only upon itself, and its own members, it follows, that the application of the rule in question is confined to the house in which the previous proceeding has taken place, and to the members of that house. Thus, if a bill is pending, or has been rejected in one house, the same bill, that is, a bill of the same tenor, may nevertheless be introduced in the other; inasmuch as the latter has not as yet come to any judgment upon that or a similar bill. If such bill passes in the house in which it is begun, it may be sent from that house to the other, and so introduced in that house although a similar bill is there pending, or has been passed, or rejected; because the judgment of that house is obligatory only to prevent the introduction of such a bill by its own members, but not to its introduction from the other house, which is an independent and coordinate branch. If the introduction of a bill from the other house, in this manner, cannot be objected to, on the ground of order, so neither can its being proceeded upon and passed. Whether the house, to which it is sent, having already expressed its opinion by rejecting a similiar bill, or having a similar bill then under consideration, will reconsider its judgment, and pass the bill thus sent, is a question which does not depend upon the order or method of proceeding."

We respectfully submit that this disposes absolutely of the contention that the Nineteenth Amendment was improperly ratified in West Virginia. There is no provision in the Senate rules indicating that Rule 52 prevents action on bills coming from the other House; the same is true of Reed's Rules, which have been put in evidence. The decision in *Smith vs. Mitchell*, 69 W. Va., 481, is in no wise to the contrary, as was very clearly pointed out in the opinion of the Court of Appeals of Maryland in the present case (Record, page 160).

A somewhat similar question was before the Supreme Court in the case of *Rainey vs. United States*, 232 U. S. 310, in which

the question was as to the constitutionality of Sec. 37 of the Tariff Act of August 5, 1909, imposing an excise tax based on gross tonnage upon the use of foreign-built pleasure yachts. The section was proposed by the Senate, as an amendment to the act, and was contended to be void, as a bill for raising revenue originating in the Senate in conflict with the constitutional provisions that all such bills should originate in the House. The Court held that it was sufficient to validate the section to show that it was adopted as an amendment to a bill for raising revenue originating in the House; and that having been duly enrolled and authenticated as an Act of Congress, it was not for the Court to determine whether the amendment was outside the purpose of the original bill.

CONCLUSION

It is but to repeat an often-asserted rule of constitutional interpretation to say that every possible presumption of both law and fact must be raised in favor of the constitutionality of the Nineteenth Amendment and the regularity of its adoption. It cannot be stricken down as void unless it plainly contravenes some provision of the constitution and the mere existence of a reasonable doubt will not be sufficient to overthrow it. To invalidate it, there must be shown not only a reasonable doubt as to its constitutionality and the propriety of its ratification; there must be shown unconstitutionality or improper ratification existing beyond the shadow of reasonable doubt.

Knox vs. Lee, 12 Wall. 457.

This, we submit, the plaintiffs-in-error have not shown, and cannot show. They have asked that an amendment to the Federal Constitution be declared invalid which has been acted upon as follows:

(a) Approved by two-thirds of each branch of Congress.

(b) Declared ratified, and certified by the chief executives of 38 States,—more than three-fourths—as having been ratified, by the legislatures of those States.

(c) Promulgated by the Secretary of State of the United States of America as part of the Federal Constitution.

(d) Accepted generally by the citizens of the several States as an accomplished fact.

(e) Recognized by the State of Maryland in that her chief executive called a special session of the legislature to make provision for the enfranchisement of women; in that her legislature at that special session passed the act which we have previously cited, making provision for the registration of female voters; and in that her judiciary in the instant case have upheld its validity.

(f) Actually put in operation by the tremendous vote of the women at elections in every State, so that if the Amendment be declared invalid, the validity of elections throughout the country will be called into question.

It cannot possibly be said that the subject matter of the Nineteenth Amendment is unconstitutional beyond a reasonable doubt, when we have, embodied in our organic law and upheld consistently by the Courts of the whole country the Fifteenth Amendment, of a character precisely similar, and the Eighteenth Amendment, carrying every whit as wide possibility of an extension of the powers of the Federal government into the realm of State's rights.

Nor can it, we respectfully submit, be said that the ratification of the Amendment has been shown beyond a reasonable doubt to be improper. The declarations of the State Legislatures, the certificates of the Governors, the Proclamation of the Secretary of State of the United States—these should be sufficient to raise a reasonable doubt against invalidating improprieties. The constitutional limitations contained in the various State Constitutions can be regarded in no other light than as meaningless and futile expressions. If invalidating improprieties exist, they must be found in the formal processes of voting in the State legislatures. We doubt that this is a fit subject for judicial investigation. But even were it so, it must be borne in mind that to show improper ratification sufficient to overcome the Amendment, *such improper ratification must be shown conclusively as to at least three States, because of the subsequent ratifications of Connecticut and Vermont.*

It is submitted, therefore, that the decision of the Maryland Court of Appeals should be affirmed.

Respectfully submitted,
GEORGE MOORE BRADY,
ROGER HOWELL.
For Defendants-in-Error, Caroline Roberts, et al.

MALOY, BRADY, HOWELL & YOST,
JACOB M. MOSES,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1921.

No. 553.

OSCAR LESER, ET AL.,
PLAINTIFFS IN ERROR,

against

J. MERCER GARNETT, ET AL.,
DEFENDANTS IN ERROR.

ON ERROR AND PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

BRIEF FOR DEFENDANTS IN ERROR.

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Note: No References to the Appendix are given.

OTHER QUOTATIONS.

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STATEMENT OF THE CASE.

The defendants in error concede the correctness of the greater part of the statement of the case contained in the brief for plaintiffs in error. There are, however, three portions of that statement on which they take issue.

1. THE MARYLAND CONSTITUTION.

On page two of the brief for plaintiffs in error occurs the following allegation:

> "The Constitution of Maryland limits the right of suffrage to adult male citizens of sound mind, not convicted of larceny or other infamous crime or bribery of voters or illegal voting, and possessing certain qualifications as to residence, * * *."

In fact, the Constitution of Maryland limits the right of suffrage to adult *white* male citizens of sound mind, not convicted of larceny or other infamous crime or bribery of voters or illegal voting, and possessing certain qualifications as to residence. The effect of the Fifteenth Amendment to the Constitution of the United States has been to obliterate the word "white" from the provisions of the Constitution of Maryland defining the limits of the elective franchise, but those provisions have not been changed by any act of the State of Maryland or the Legislature or people thereof, though the Courts of Maryland have recognized the effect of the Fifteenth Amendment upon the provisions in question.

See *Myers vs. Anderson*, 238 U. S. 368.

2. EVIDENCE OF THE LAW OF WEST VIRGINIA.

This is discussed on pages 11, 12 and 13 of the brief for plaintiffs in error. The plaintiffs in error introduced in evidence the decisions of the Supreme Court of Appeals of West Virginia in the case of *Osborne vs. Staley*, 5 W. Va. 85, and *Smith vs. Mitchell*, 69 W. Va. 481.

In *Osborne vs. Staley* it was contended that an act of the Legislature of West Virginia had not been passed in the manner required by the Constitution of the State. The Court noticed a provision of the Constitution requiring an affirmative vote in each house of a majority of the members elected thereto, and a provision requiring the vote to be recorded in the journal. It was plainly intimated that, but for these constitutional provisions, the Court would not examine the journal of the Senate, in order to ascertain the number of those voting for the bill in question. Because, however, of those constitutional provisions, the Court made this examination. Upon making it, the Court was of the opinion that the

bill had not received the vote required by the Constitution, but, in spite of this opinion, gave effect to the ruling of the presiding officer of the Senate, sustained on appeal to the floor, that the bill had received the number of votes required by the Constitution.

In *Smith vs. Mitchell*, a bill which had been passed by the lower house of the legislature was substituted in the Senate for a bill in the same words which had been twice read in the Senate. The bill thus substituted was then read once and passed. After its return to the House, a motion to reconsider was made in the Senate, but the House refused to return the bill. It was contended that there had been a failure to comply with a constitutional provision requiring that a bill should be read three times in each house. The Court held that the provision had been complied with, because *within the meaning of that provision*, the two bills were to be considered one. It was also contended that the refusal of the House to return the bill to the Senate was a violation of the constitutional provision conferring upon each house the power to make its own rules, on the ground that a rule of the Senate provided for reconsideration of the vote by which a bill was passed. The Court considered the question presented, namely, whether a constitutional right secured to one house of the Legislature had been invaded by the other house, and decided that it had not, because the bill which was the subject-matter of dispute was no longer within the control of the Senate, which, in a dispute with the lower House, had sought to invoke one of its rules.

Nowhere is it intimated that one of the houses of the Legislature, which is clothed with the power of making its own rules, has not also the power of interpreting those rules. On the contrary, the case of *Osborne vs. Staley* shows that, whenever possible, the Court will fol-

low the decision of one of the houses of the Legislature, even in the interpretation of a positive provision of the Constitution of the State.

3. CERTIFICATE OF THE GOVERNOR OF TENNESSEE.

The plaintiffs in error, on page 15 of their brief, in reviewing defendants' evidence, state that the transcript attached to the certificate of the Governor of Tennessee is not a true, full and correct transcript of all entries pertaining to Senate Joint Resolution No. 1 of the General Assembly of the State of Tennessee. The certificate of the Governor, which certifies that the transcript is true, full and correct, is dated August 24th, 1920, and it is submitted that the transcript was true, full and correct, containing all the proceedings of the Legislature at the date of the certificate. We cheerfully admit that the Governor of Tennessee did not include in the transcript attached to his certificate any record of events which had not occurred until after the day when his certificate was signed.

ARGUMENT.

I.

THE NINETEENTH AMENDMENT DOES NOT EXCEED THE LIMITS OF THE POWER TO AMEND THE CONSTITUTION OF THE UNITED STATES RESERVED IN ARTICLE V.

We shall consider, first, the contention of the plaintiffs in error that there are implied limits of the amending power, and that the Nineteenth Amendment exceeds those limits, and secondly, the contention that it exceeds the express limits contained in Article V of the Constitution.

1. THERE ARE NO IMPLIED LIMITS.

a. No Decision Upholds the Doctrine of Implied Limits.

The burden is on the plaintiffs in error to show that implied limits upon the amending power exist. We admit that there is no case which decides that such limits either do or do not exist. There is, therefore, no case in which the contention of the plaintiffs in error was upheld.

The Constitution had been in force for more than one hundred and thirty years, and seventeen amendments had been added to it before anyone even suggested the doctrine of implied limits.

When, for the first time, it was urged in this Court that implied limits to the amending power exist, the Court announced as one of its conclusions:

> "The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by Article V of the Constitution."
>
> *Rhode Island vs. Palmer*, 253 U. S. 350.

Mr. Justice McKenna, who dissented from some of the conclusions of the Court, was so far from dissenting from this conclusion that he remarked that it seemed to assert the undisputed (page 393). Nowhere, either in the conclusions of the Court or in the opinions of the members thereof, is anything said which can be taken to uphold the contention of the plaintiffs in error in the instant case that there exist any implied limits to the power to amend the Constitution.

The plaintiffs in error, unable to cite judicial authority in support of their novel contention, endeavor to sustain it by reference to history, analogy and reason.

They seem, however, to overlook the arguments upon the other side which can be drawn from these sources.

> "While weighing arguments, drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction which the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import."
>
> *Cohens vs. Virginia*, 6 Wheat. 264, 384.

b. History Refutes the Doctrine.

i. *The Nature of the Amending Power.*

Throughout the argument of our opponents they have assumed that the power to amend the Constitution was a *delegated* power, a power delegated by the people to two-thirds of each house of the Congress, and to the Legislatures of three-fourths of the States or conventions thereof, as the one or the other mode may be proposed by the Congress. We submit that, on the contrary, it is, as stated in the above quoted passage from *Rhode Island vs. Palmer*, a *reserved* power, a power reserved by the people of the several States to themselves, as represented by legislatures or conventions, the proportion of such legislatures or conventions whose affirmative votes are necessary to the adoption of an amendment being fixed at three-fourths.

The adoption of an amendment to the Constitution involves, first, a proposal, and secondly, a ratification. The proposal may be made by the Congress upon a vote of two-thirds of each house, or by a Convention called by the Congress on the application of the legislatures of two-thirds of the several States. When, however, the Congress proposes an amendment, it does no more than

was done by the Constitutional Convention, which, through the then existing Congress of the United States, submitted the Constitution to the several States. This Court has said that:

> "The instrument, when it came from their hands, was a mere proposal, without obligations or pretensions to it."
>
> *McCulloch vs. Maryland*, 4 Wheat. 316, 403.

This language exactly describes a proposed amendment, when it comes from the hands of the Congress.

The power to ratify a proposed amendment is reserved to the people of the several States, acting through legislatures or conventions. It has always been considered a power reserved to the people. The Article providing for the amendment of the Constitution which was first proposed to the Convention provided that:

> "On application of the legislatures of two-thirds of the States in the Union for an amendment to this Constitution, the legislature of the United States shall call a convention for that purpose."

Hamilton, who contended that the national legislature should have the power to call a convention, by a vote of two-thirds of each branch, without the application of the State legislatures, said:

> "There could be no danger in giving this power as the *people* would finally decide in the case." (Italics ours.)
>
> 5 *Elliot's Debates*, 530.

The changes proposed by Hamilton and a number of other changes were made before the article relating to amendments was finally incorporated in the Constitution as Article V.

The debate upon this Article, both in Committee of the Whole and in Convention, is given in Appendix A, annexed to this brief.

As the Article finally stood, the power of ratifying amendments therein contained was still considered as a power reserved to the people.

In *Hollingsworth vs. Virginia*, 3 Dal. 378, Attorney General Lee, discussing the amending power, said:

> "*The people* limit and restrain the power of the legislature acting under a delegated authority; but they impose no restraint on themselves." (Italics ours.)

In the *Slaughter-House Cases*, 16 Wall. 36, this Court, referring to the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution, said that:

> "Within the last eight years, three other articles of amendment of vast importance have been added, by the voice of *the people*, to that now venerable instrument." (Italics ours.)

The above quotations are sufficient to show that the power of ratifying amendments is a power reserved to the people. In ratifying amendments, the people, it is true, act in their several States in one of the modes prescribed in Article V. They provided, when they adopted the Constitution, that one or the other of these modes should be employed. The people "have excluded themselves from any direct or immediate agency in making amendments * * * and have directed that amendments should be made representatively for them, by the Congress of the United States, when two-thirds of both houses shall propose them; or where the Legislatures of two-thirds of the several States shall call a convention for proposing amendments, which in either case become valid, to all intents and purposes, as a part of the Con-

stitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths of them, as one or the other mode of ratification may be proposed by Congress."

Dodge vs. Woolsey, 18 How. 331.

This amounts to a delegation of the power of proposing amendments, coupled with a reservation of the power of ratifying such amendments. There is no general delegation of this last mentioned power by the people of the several States to any body outside of those States. The power is reserved to the people of the several States, though the vote of each State is to be cast by its legislature or by a convention.

Suppose that thirteen men associate themselves for some purpose under articles of agreement. They provide that those articles of agreement may be amended by a supplemental agreement to be executed by three-fourths of those who are parties to the original agreement or who may subsequently become parties to it. This certainly does not constitute a delegation of the power to alter the agreement, being simply a provision that the parties thereto shall be bound by the action of a certain proportion of their number. If the parties to the agreement also provide that each shall be bound by the act of an attorney therein named by him, that amounts to a delegation by each of the power to assent to alterations, and it goes no further. The power is still reserved to the several parties to the agreement, although each must act through a designated agency.

ii. *The Method of Exercising the Amending Power.*

The necessity of providing for amendments was recognized at an early stage of the proceedings of the Constitutional Convention. It was proposed, in Committtee of

the Whole, "that provisions ought to be made for hereafter amending the system now to be established without requiring the assent of the national legislature."

> "Col. Mason urged the necessity of such a provision. The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments, therefore, will be necessary; and it will be better to provide for them in an easy, regular, and constitutional way, than to trust to change and violence."
>
> 5 *Elliot's Debates*, 182.

In this there is a clear recognition of the fact that, when changes should be found necessary, they would be made, and that, if a provision for making such changes were not incorporated in the Constitution, the impossibility of altering that instrument by constitutional means would lead to its alteration by other means, involving possible violence. It seemed necessary, therefore, to provide a constitutional method of making such alterations as might be demanded, no matter how far-reaching such alterations might be.

That they might be far-reaching the Convention fully realized. The possible consequences of an unrestrained power to amend were called to the attention of the assembled delegates in convention by Mr. Gerry, who moved to reconsider Article 19, which provided:

> *On the application of the legislatures of two-thirds of the States in the Union, for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose.*

"This Constitution, he said, is to be paramount to the State Constitutions. It follows, hence, from this Article, that two thirds of the States may obtain a con-

vention, a majority of which can bind the Union to innovations that may subvert the State Constitutions altogether."

Hamilton "did not object to the consequences stated by Mr. Gerry," but it is evident that he clearly recognized them. His answer to Gerry's objection was that: "There was no greater evil in subjecting the people of the United States to the major voice, than the people of a particular State. It had been wished by many, and was much to have been desired, that an easier mode of introducing amendments had been provided by the Articles of the Confederation. It was equally desirable now, that an easy mode should be established for supplying defects which will probably appear in the new system. The mode proposed was not adequate. The State legislatures will not apply for alterations, but with a view to increase their own powers. The national legislature will be the first to perceive, and will be most sensible to, the necessity of amendments; and ought also to be empowered, whenever two-thirds of each branch should concur, to call a convention. There could be no danger in giving this power, as the people would finally decide in the case."

The motion to reconsider having prevailed by a vote of nine States to one, Sherman moved to add to the Article: "or the legislature may propose amendments to the several States for their approbation; but no amendments shall be binding until consented to by the several States."

It is apparent that this language would have left room for construction. It might have been interpreted as requiring either unanimous consent or the consent of a majority. Accordingly, Wilson moved to insert "two-thirds of" before the words "several States," a motion

which was lost by only one vote, being supported by five States and opposed by six. He then moved to insert "three-fourths of" before "the several States," which was agreed to, *nem. con.*

5 Elliot's Debates, 530.

The Article, as it stood at this stage of the proceedings, required ratification by three-fourths of the States, but the method of ratifying had not been determined. Madison then introduced the following substitute:

> "The legislature of the United States, whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid, to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths, at least, of the legislatures of the several states, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the legislature of the United States."

A proviso having been added, "that no amendments which may be made prior to the year 1808, shall in any manner affect the fourth and fifth sections of the seventh article," the proposed substitute was adopted by a vote of nine States to one. As subsequently presented to the Convention under the title of Article V, the proposed article reads as follows:

> "The Congress, whenever two-thirds of both Houses shall deem necessary, or on application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths at least of the legislatures of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification

> may be proposed by the Congress; provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the ninth section of Article I."

The Convention had now determined the agencies which should be employed by the several States to act for them in the ratification of proposed amendments. This was done *after* it had been determined that the ratification of the States should be necessary and *after* the proportion of States necessary to ratification had been fixed. During the discussion of the proposed article in the form last quoted, Gouverneur Morris and Gerry moved to amend it, so as to require a convention on application of two-thirds of the States. Madison found an objection to the provision for a convention, "that difficulties may arise as to the form, the quorum, &c., which in constitutional regulations ought to be as much as possible avoided." The motion of Morris and Gerry was agreed to, *nem. con.*, but the above stated objection to conventions may have led to the subsequent action of Gerry, who moved to strike out the words "or by conventions in three-fourths thereof." This motion was lost by a vote of ten States to one, but it appears from the above that the Convention had at least considered a proposition which would have made the legislatures of the several States the sole agencies for recording the assent of the States to the ratification of amendments.

It appears, then, that the members of the Convention fully realized the possible consequences of the power to amend the Constitution which was reserved under the terms of Article V, that they realized that, by the use of this amending power, innovations might be introduced that might "subvert the Constitution altogether," but that they considered that the method of making amendments provided by that article was a sufficient safeguard against the introduction of such innovations. They

doubtless felt safe against the introduction of amendments which might subvert the State governments, when they made it impossible to adopt such amendments without the consent of three-fourths of the States.

There is no doubt that they still realized how far-reaching might be the amendments which Article V reserved the power to adopt. After the motion of Morris and Gerry had prevailed, Sherman moved to annex to the end of the article a further proviso—"that no State shall, without its consent, be affected in its internal police, or deprived of its equal suffrage in the Senate."

Madison said: "Begin with these special provisos, and every State will insist on them, for their boundaries, exports, etc."

Madison did not take the ground that the article, as it stood, was not sufficiently broad to make possible the adoption of amendments which would affect the States in their internal police or might even change their boundaries, for there could have been no objection to provisos which would have had no other effect than to express what was already implied. Evidently he objected to the introduction of further restrictions upon the amending power. It is equally evident that Sherman realized that, without the proviso which he had sought to introduce, there was nothing to prevent the adoption of amendments which might affect the States in their internal police, for, when his motion was defeated, he moved to strike out Article V altogether. After this motion had also been defeated, Gouverneur Morris moved to annex a further proviso—"that no State, without its consent, shall be deprived of its equal suffrage in the Senate," which was agreed to without debate and without opposition.

The whole course of the debate, therefore, shows clearly and explicitly that there are no implied or inherent limits of the amending power, and that the framers of the Constitution intended that there should be none. There is nowhere the slightest suggestion that any implied limitation of that power exists; the implications are all opposed to any such idea.

Applying the language above quoted from *Cohens vs. Virginia*, we are led irresistibly to the conclusion that Article V means what it says, and that, under its terms, is reserved a power of amendment which is limited only by the express provisos contained in the article.

c. *Analogy Does Not Sustain the Doctrine.*

The plaintiffs in error have cited decisions which established the doctrine of implied limitations upon the power of taxation, and have sought to show that, by analogy, there exist implied limitations upon the power to amend. But there can be no analogy between a delegated power and a reserved power.

We are not without decisions of this Court which show how far the respective powers of the national government and those of the several States may be altered by amendments to the Constitution. In *Hollingsworth vs. Virginia*, 3 Dal. 378, this Court upheld an amendment which imposed an important limitation upon the jurisdiction of the federal judiciary. That decision involved the establishment of the principle that all judicial authority exercised in the United States could be taken away by an amendment to the Constitution. The principle was very definitely and explicitly stated in argument, the Attorney General saying:

> "The people limit and restrain the power of the legislature acting under a delegated authority; but

> they impose no restraint on themselves. They could have said by an amendment to the Constitution, that no judicial authority should be exercised, in any case, under the United States; and, if they had said so, could a court be held, or a judge proceed, on any judicial business, past or future, from the moment of adopting the amendment? On general ground, then, it was in the power of the people to annihilate the whole, and the question is, whether they have annihilated a part of the judicial authority of the United States?"

Of course, if the jurisdiction of the Federal Courts may be indefinitely restricted or entirely abolished, it may also be indefinitely extended, and its indefinite extension would mean the practical annihilation of the jurisdiction of the State judiciary.

The power so to amend the Constitution as to deprive the States of all legislative powers is implied in the decision of *Rhode Island vs. Palmer, supra.* This is admitted by Mr. William L. Marbury, of counsel for the plaintiffs in error. In a pamphlet entitled "The Nineteenth Amendment and After," reprinted from the *Virginia Law Review*, Volume VII, No. 1, Mr. Marbury states (p. 21), that "the Prohibition Amendment does undoubtedly have the effect of diminishing the reserved legislative powers of the State by transferring one of the subjects of that power to the Central Government, *thereby establishing a precedent for the adoption of other Amendments in the future by means of which all the legislative powers of the States may be taken away.*" (The italics are Mr. Marbury's.) We have, then, decisions of this Court which show that, under the amending power, the States may be deprived of all judicial authority and of all legislative power.

The absolutely unlimited character of the power to amend is clearly indicated by the language used in the *Slaughter-House Cases*, 16 Wall. 36:

"The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, *in the absence of language which expresses such a purpose too clearly to admit of doubt.*

"We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the Legislatures of the States, which ratified them." (Italics ours.)

The Court was not discussing the effect of Article V, but the effect of amendments adopted under the power to amend reserved by the terms of that article. When, therefore, the Court refused so to construe those amendments as to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; and so as radically to change the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people, in the absence of language which expresses such a purpose too clearly to admit of doubt, the implication is clear that, if the language of the amendments which the Court was discussing had expressed these purposes too clearly to admit of doubt, the Court would have given effect to that lan-

guage. When the Court expressed the conviction that no such results were intended by the Congress which proposed these amendments nor by the Legislatures of the States, which ratified them, the implication is clear that, if the Court had been convinced that these results were intended, it would have given effect to that intention.

If the Court had felt any doubt whatever as to the extent of the power to amend reserved by Article V, there could have been no more appropriate occasion for the intimation of such a doubt.

d. *Reason Refutes the Doctrine.*

"The people," said Chief Justice MARSHALL, "made the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will. But this supreme and irresistible power to make or to unmake, resides only in the whole body of the people; not in any sub-division of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it."

Cohens vs. Virginia, 6 Wheat. 264, 389.

The people, as Chief Justice MARSHALL said, can unmake the Constitution. Does this mean that the unmaking of the Constitution requires the affirmative voice or the affirmative action of every citizen of the United States? Does it even mean that the affirmative voice or the affirmative action of every State of the Union is required? Such a contention would be absurd, for a purpose to change the whole form of government or even to destroy the Union of the States altogether would be bound to prevail, if all the States but one participated in that purpose. Such a purpose would be bound to pre-

vail, if three-fourths of the States participated in it. If no constitutional machinery existed for giving effect to such a purpose, it would, if supported by so large a proportion of the States, prevail by revolutionary means. It was because no constitutional means existed for amending the Articles of Confederation, except by the consent of every State, that the whole form of government was changed by a revolution, fortunately free from violence. To prevent a change by revolutionary means, possibly accompanied by violence, of the government then formed, a constitutional means of changing the instrument of government was incorporated in that instrument itself. Those who framed it thought it better, in the words of Colonel Mason, to provide for amendments "in an easy, regular, and constitutional way, than to trust to change and violence." They realized that, if a sufficiently large majority favored a change, even a change which should wholly alter the entire plan of government, that change would be made; that if it could not be made under the provisions of the Constitution, it would be made by subverting the Constitution; that if it could not be made by peaceable means, it would be made by force. They, therefore, provided a constitutional means for making all alterations which the people might in the future demand, realizing fully that those alterations might be of so radical a character as, in the words of Gerry, to "subvert the State constitutions altogether."

Although they realized that such alterations *could* be made, they did not expect that they *would* be made. They regarded them as constitutional possibilities, but scarcely as practical possibilities. They had prepared a plan of government which they hoped would be found successful, and which they had done all in their power to make successful.

> "The National Constitution * * * assumed that the government and the Union which it created, and

the States which were incorporated into the Union, would be indestructible and perpetual; and as far as human means could accomplish such a work, it intended to make them so."

White vs. Hart, 13 Wall. 646, 650.

"The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States."

Texas vs. White, 7 Wall. 700, 725.

That is to say, the Constitution contemplates the indestructibility of the Union and the indestructibility of the States. The framers of that instrument assumed and intended that both the States and the Union should be indestructible. They hoped that the plan of government founded upon that assumption and intention would prove a practical success. If, however, a time should ever come when, in the opinion of an overwhelming majority, that plan of government had not proved successful in practice, they realized that it would be changed, and they left the way open to change it by constitutional means, even though the alterations thereby effected might be so radical as to amount to a practical destruction of that Union of the States which was the essential feature of the plan.

That this essential feature might be destroyed without resort to the amending power is evident from a very brief consideration of the terms of Section 3 of Article IV. For, since a State may be formed by the junction of two or more States, with the consent of the Legislatures of the States concerned as well as of the Congress, it follows that Congress, with the consent of the Legislatures of the several States, may combine every State in the Union into one State, and this may be done by the votes of a mere majority of each branch of Congress and of the Legislatures of the several States. If

this were done, the States as they now exist and the Union of the States would be destroyed. The Constitution did not look to, did not contemplate any such event; but that its provisions make it possible to accomplish just such a result by constitutional means is so clear as to be indisputable.

c. *Summary.*

The falsity of the assumption that the amending power is a delegated power invalidates all of the ingenious argument as to the implied limits of that power which has been made on behalf of the plaintiffs in error. When it is realized that this is a power reserved, and not delegated, the whole of that argument falls to the ground.

2. THE NINETEENTH AMENDMENT DOES NOT EXCEED THE EXPRESS LIMITS OF THE AMENDING POWER.

a. THE PROVISO CONTAINED IN ARTICLE V.

The power to amend the Constitution reserved in Article V was expressly limited by provisos, of which the only one still in effect reads as follows:

> "That no State without its consent shall be deprived of its equal suffrage in the Senate."

The provision whereby each State is entitled to an equal voice in the Senate was contained in Section 3 of Article I of the Constitution, the first paragraph of which section reads:

> "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote."

The right secured to each State by the above quoted proviso to Article V was the right to be represented in

the Senate by those who should have a voice in that body equal to that of every other State. Of this right the State could not be deprived even by the exercise of the amending power, without its consent. Further than this the proviso does not go. The number of Senators from each State could have been increased, or the numbers could have been made unequal, provided equality of the votes of the several States had been preserved by giving an equal value to the votes to be cast by each State, as was done in the Constitutional Convention, and as must be done in the House of Representatives, when the duty of electing the President devolves upon that body. Other changes not affecting the right of the several States to an equal voice can be made, and such changes have been made.

By the Fourteenth Amendment restrictions were imposed upon the States as to the persons by whom they might be represented in the Senate, for, by Section 3, every person "who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof," was excluded from that body until such time as Congress might, by a vote of two-thirds of each House, remove such disability.

By the Seventeenth Amendment, the election of Senators was taken out of the hands of the Legislatures of the several States and conferred upon the people thereof, the electors in each State to have the qualifications requisite for electors of the most numerous branch of the State Legislatures. The plaintiffs in error, in the third prayer submitted by them to the Court of Common Pleas, assume and concede the validity of this amend-

ment. It is to be noted that the number of electors entitled to vote for members of the State Legislatures had, before the adoption of the Seventeenth Amendment, been greatly augmented by the effect of the Fifteenth Amendment.

b. THE STATES WHOSE RIGHTS ARE SECURED BY THE PROVISO.

By the terms of the proviso equal suffrage in the Senate is secured to each State. What is meant by the word "State"? The answer is to be found in the decisions of this Court.

> "By a State forming a republic (speaking of it as a moral person) I do not mean the legislature of the state, the executive of the state, or the judiciary, but *all the citizens* which compose that state, and are, if I may so express myself, integral parts of it; all together forming a body politic." (Italics ours.)
>
> *Penhallow vs. Doane's Administrators*, 3 Dal. 54, 93.

> "*The people* of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence." (Italics ours.)
>
> *Lane County vs. Oregon*, 7 Wall. 71, 76.

> "A State, in the ordinary sense of the Constitution, is a political community of *free citizens*, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." (Italics ours.)
>
> *Texas vs. White*, 7 Wall. 700, 721.

The point to be emphasized is that the State is composed of all its people, all its free citizens, and not merely of its voting citizens—its citizens invested with political

rights. It is this whole body of the citizenship of a State which is protected by the proviso that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

c. EFFECT OF THE SEVENTEENTH AMENDMENT.

We have seen that, prior to the adoption of the Seventeenth Amendment, the Legislatures of the several States were charged with the duty of electing Senators; that the Seventeenth Amendment transferred this duty to those persons in each State who should have the qualifications requisite for electors of the most numerous branch of the State Legislatures; and that the validity of this amendment is conceded by the plaintiffs in error. By this amendment a very important change was effected. The mode of electing Senators was wholly changed, and there can be no doubt that the framers of the Constitution would have looked upon this change as of the greatest importance. To them it seemed wise to entrust the election of the highest officials to a comparatively small number of men, entrusted, because of their superior ability, with the performance of that duty. Witness the elaborate provisions for the election of the President and Vice-President. In the same spirit in which they conferred upon electors specially chosen for that purpose the power of electing the Chief Magistrate, they conferred upon the Legislatures the power of choosing Senators.

All this was completely changed by the Seventeenth Amendment. It is true that, by that amendment, the power of electing Senators was conferred upon those persons entitled to vote for the most numerous branch of that body which, prior to the adoption of the amendment, had, itself, possessed the power of electing Senators. But the people of a State might be willing to give to a numerous class of the citizens of that State the

power to elect the Legislature thereof, and, at the same time, might object to the election by the same class of persons of those who were to represent the State in the Senate of the United States.

The Seventeenth Amendment, however, is valid, as the plaintiffs in error concede it to be. Though it confers the power of electing Senators upon persons on whom the States did not confer that power and on whom the Constitution of the United States had not previously conferred it, it leaves the States with an equal voice in the deliberations of the Senate, and, therefore, deprives no State of the right secured to it by the proviso contained in Article V.

d. EFFECT OF THE NINETEENTH AMENDMENT.

The Nineteenth Amendment reads as follows:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of sex.
>
> "Congress shall have power to enforce this article by appropriate legislation."

This amendment in effect strikes out the discriminating word "male" from those State Constitutions and statutes which confine the suffrage to persons of the male sex. Since its adoption, therefore, that right has been enjoyed by a greatly augmented number of those people—those free citizens—who, in the words of this Court, "compose a State."

The adoption of the Nineteenth Amendment did not confer citizenship upon women. Before its adoption they might be citizens.

Minor vs. Happersett, 21 Wall. 162.

Since the adoption of the amendment, women who are citizens of a State and who possess the other qualifications which, under the Constitution and statutes of that State, entitle them to the right of suffrage, may exercise that right, in spite of provisions in State Constitutions or statutes which, prior to the adoption of the amendment, would have deprived them thereof. But, before enjoying the right of suffrage, they were among those people who composed the State, and were, as citizens of the State, represented in the Senate of the United States. The Legislatures which, prior to the adoption of the Seventeenth Amendment, chose the Senators represented the whole citizenship of the State, and not merely those citizens who directly participated in their election. The part played by unenfranchised women in all public affairs, the great influence which, though deprived of the vote, they exercised in those affairs were a subject on which they were often gravely lectured by those who opposed their enfranchisement. The extension of the suffrage to these citizens of the State does not, therefore, deprive the State of its equal suffrage in the Senate, any more than does the transfer of the power of electing Senators from the hands of the Legislatures to those of the electors of the most numerous branch thereof.

c. THE LAW OF CORPORATIONS DOES NOT APPLY.

The argument which the plaintiffs in error seek to base upon the decision in *Dartmouth College vs. Woodward*, 4 Wheat. 518, may be briefly answered. The legislation there in question sought to enlarge a self-perpetuating board of trustees, who composed the managing body of a corporation, by the admission of members previously unconnected with that corporation, and to fill such vacancies as might occur by the appointment of others previously unconnected with the corporation, so

that eventually the board of trustees would be composed entirely of persons who had, prior to the enactment of this legislation, no connection whatever with the corporation. The Court held that this violated the constitutional provision which prohibited the State from passing any law impairing the obligation of contracts. The case is not analogous, if for no other reason than because the trustees who were added to the membership of the board by the legislation in question were not members of the corporation before the enactment of that legislation.

It may be useful, however, to give a little further consideration to this subject. Suppose that Dartmouth College had been entitled, like the Universities of Oxford and Cambridge, to representation in the legislature, and that, under the Constitution of the State of New Hampshire, the right had been reserved to amend the charter of that corporation, with the proviso that it should not be deprived, without its consent, of that representation. Suppose that a statute had taken the right of electing representatives from the governing body of the college and conferred it upon a certain portion of the student body. If, thereafter, another statute had extended the right to the entire student body, members of that portion thereof upon whom it had previously been conferred would certainly not have been heard to complain. They would have been told that, if the act conferring this right upon them was valid, the act extending that right to their fellow-students was certainly so.

f. SUMMARY.

The Nineteenth Amendment may be said to dilute and diminish the right of electing Senators conferred upon the male voters of the State, not by the Constitution of the State and not by the Constitution of the United States, as originally adopted, but by the Seventeenth

Amendment, taken in connection with the Fifteenth Amendment. The proviso to Article V, therefore, does not protect such persons in a right which they did not possess at the time of the adoption of the Constitution of which Arteile V is a part.

The extension of the right to vote to citizens of a State who were not previously entitled to its exercise does not deprive that State of its equal suffrage in the Senate, and, not being, therefore, within the proviso to Article V, is within the power to amend reserved by the terms of that Article.

We have not thought it necessary to answer at length the contention of plaintiffs in error that, under the provisions of the Nineteenth Amendment, the power of the States to consent to a future amendment which might seek to deprive them of their equal suffrage in the Senate might be taken away, for we do not consider that this question is before the Court. If, at any time in the future, the contention should be made that a State has consented to an amendment which deprived it of its equal suffrage in the Senate, and if this contention should be met by the assertion that the State had not consented, because by the adoption of the Nineteenth Amendment it had been deprived of its power to consent, the Court could then consider the question which the plaintiffs in error now seek to raise.

3. THE FIFTEENTH AMENDMENT AS A PRECEDENT.

The Nineteenth Amendment is in the same words as the Fifteenth, except that the word "sex" is substituted for the words "race, color or previous condition of servitude." It would seem, therefore, that if the Fifteenth Amendment is within the power reserved by Article V, the Nineteenth Amendment must also be within that power.

a. The Validity of the Fifteenth Amendment.

This Court has repeatedly referred to the Fifteenth Amendment as a part of the Constitution. A few of the cases in which such references have been made are:

United States vs. Reese, 92 U. S. 214;
Neal vs. Delaware, 103 U. S. 370;
Guinn vs. United States, 238 U. S. 347;
Myers vs. Anderson, 238 U. S. 368.

The earliest of the cases above cited was decided in 1876, only six years after the adoption of the Fifteenth Amendment. Nowhere in any of these decisions does the Court intimate any doubt as to the validity of the amendment. It is contended that in the earlier cases the validity of the amendment was not directly involved. But suppose that there had been an amendment to the Constitution, providing that every State which had attempted to secede from the Union should, either permanently or for a definite term of years, be deprived of the right to elect Senators. Would this Court ever have referred to such an amendment except to declare it unconstitutional as a violation of the terms of the proviso contained in Article V? Whatever may be said as to the decisions in the earlier cases, however, it is clear that the later decisions of this Court, and particularly *Myers vs. Anderson, supra*, directly involved the validity of the amendment, and that this question, if ever in doubt, is no longer so.

b. The Consent of the States.

The plaintiffs in error contend that, although a number of States, including Maryland, never ratified the Fifteenth Amendment, they must be held to have consented thereto. The argument seems to be that this consent is to be inferred from the absence of protest and resistance.

Certainly the doctrine which the plaintiffs in error seek to establish is extremely vague. For what length of time must a State abstain from protest against or resistance to an amendment in order to give rise to the presumption that it has consented thereto? Is it twenty years? Is it fifteen years? If so, the State of Delaware which rejected the amendment, had not consented thereto at the time of the decision in *Neal vs. Delaware, supra.* Is it ten years or seven years? If so, the State of Kentucky, which also rejected the amendment, had not consented thereto at the time of the decision in *United States vs. Reese, supra.* Yet the validity of the Fifteenth Amendment as a part of the Constitution of the United States was not questioned in either of these cases. Must a State, immediately upon the adoption of an amendment to which its consent is required rise in arms to resist all acts which are valid only by reason of the provisions of that amendment, and must its failure immediately and forcibly to resist such acts be considered as an evidence of its consent to the adoption of that amendment? Surely not.

It is contended that the Fifteenth Amendment, although adopted nearly five years after the close of the Civil War, must be considered as, in effect, forming part of a treaty of peace between the Government of the United States and the States which had attempted to secede. This seems to amount to a contention that the Constitution means one thing in times of peace and something else in times of war, or that the effect of its provisions is suspended in times of war. Such a contention can scarcely be maintained in view of the positive language of this Court.

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circum-

> stances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."
>
> *Ex parte Milligan*, 4 Wall. 2.

If, however, the failure of those States which rejected the Fifteenth Amendment to resist its effects, because of the threat or fear of force, is to be construed as evidence that they consented thereto, that fact, so far from supporting the argument of the plaintiffs in error, tells directly against it. Consent obtained by the threat or fear of force can certainly be no more effective than consent which is freely given. No State has resisted the operation of the Nineteenth Amendment; every State has accepted its provisions and acted in accordance therewith.

If the consent of a State to the adoption of an amendment can be evidenced in any other way than by the formal ratification of such amendment, then the State of Maryland has certainly furnished the plainest evidence that it consented to the adoption of the Nineteenth Amendment and considered itself bound by the provisions thereof. In September, 1920, the General Assembly of Maryland, which at its regular session of that year had rejected the Nineteenth Amendment, was called by the Governor in Extraordinary Session. At this Extraordinary Session, the General Assembly did not rescind its former action rejecting the amendment, but, by Chapter 1 of the Acts passed at the Extraordi-

nary Session, a statute far too long for quotation in full, it amended in many particulars the provisions of Article 33 of the Code of Public General Laws of Maryland relating to elections, and some of these amendments constitute a clear recognition of the right of women to vote. An additional section, to be known as Section 1-A of the above-mentioned article, was enacted in the following terms:

> "Wherever in this Article words or phrases are used denoting the masculine gender they shall be taken to include the feminine gender."

Section 17 of Article 33, providing for the registration of voters, was amended by the addition of the following sentences:

> "In the case of a woman who claims citizenship by marriage, the Board shall note the name of the person to whom married and where and in what court he was naturalized, or where previously registered. Under the column headed 'Remarks' they shall note whether the applicant is male or female."

Certainly no language could more clearly evidence a recognition upon the part of the General Assembly of the right of women to vote. If anything except a formal resolution of ratification can evidence the consent of a State to the adoption of an amendment to the Constitution of the United States, then Maryland has consented to the adoption of the Nineteenth Amendment.

c. Race Discrimination and Sex Discrimination.

Little need be said in answer to the attempt of plaintiffs in error to distinguish between an amendment preventing discrimination on account of race, and an amendment preventing discrimination on account of sex. It seems a strange doctrine that the Fifteenth Amendment, which, in effect, conferred the right to vote upon persons

who had just attained citizenship, who had just emerged from slavery, did not invade the rights of the States, but that those rights are invaded by the Nineteenth Amendment, which confers the right to vote upon a class of persons who, as long as the State has existed, have been free citizens thereof.

d. Summary.

The practical identity of the terms of the Nineteenth Amendment with those of the Fifteenth is conclusive of its validity. But for the novelty of the questions raised by plaintiffs in error, we might well rest the contention that the Nineteenth Amendment is within the amending power upon this consideration alone.

II.

THE NINETEENTH AMENDMENT HAS BEEN RATIFIED BY THE LEGISLATURES OF THREE-FOURTHS OF THE STATES.

The plaintiffs in error, in their attempt to support the converse of this proposition, contend, first, that *in fact* the Legislatures of Tennessee and West Virginia did not ratify the amendment, and secondly, that the Legislatures of Tennessee, West Virginia, Missouri, Texas and Rhode Island were not competent to ratify the amendment by reason of certain provisions of the Constitutions of those States.

1. TENNESSEE AND WEST VIRGINIA IN FACT RATIFIED THE AMENDMENT.

The case of West Virginia is beyond all dispute. We have shown that, even in the case of ordinary legislation, the Courts of West Virginia will not examine the journals of the houses which compose the legislative body of that State except for the purpose of determining whether those houses have failed to comply with same

constitutional provision. The only constitutional provision upon which the plaintiffs in error rely is that which confers upon each house the power to make its own rules. This provision certainly cannot confer upon the courts the power to interpret those rules, and, in the absence of any provision conferring that power on the courts, the power resides, in West Virginia as elsewhere, in the house which makes the rules.

The Courts of Tennessee might, indeed, feel free to examine the journals of the houses which compose the Legislature of that State, if the case involved ordinary legislation. The constitutional provisions under which they might make such examination do not apply, however, to a case involving the action of the Legislature upon an amendment to the Constitution of the United States. The language of the Federal Constitution, with regard to the approval by the President of Congressional action is, on its face, as broad as it well could be. It applies in terms to "every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment)." This Court, however, in *Hollingsworth vs. Virginia, supra*, held that this language did not apply to a constitutional amendment.

See also—

Warfield vs. Vandiver, 101 Md. 78;
Richardson vs. Young, 122 Tenn. 471, 530-537.

We need say nothing more in regard to this branch of the subject except by way of quotation from the learned Judge who delivered the opinion of the Court of Appeals of Maryland:

"Inasmuch as it appears that in addition to the 36 States already referred to as having ratified the

19th Amendment the State of Connecticut has also ratified it, it becomes unnecessary to consider at length the effect of the action of the Legislature of Tennessee in regard to it. In dealing with the question before it the Legislature was not bound by its rules or by its laws relating to legislation, because the ratification of an amendment to the Federal Constitution is 'not an act of legislation within the proper sense of the word,' Hawke vs. Smith, No. 1 supra (253 U. S. 221), and while it was essential that the ratification be approved by a majority of a quorum of each branch of the General Assembly, in this case that requirement was met, and it was not until that approval had once been given, that the attempt which resulted in so much confusion was made to recall it." (Record, page 160.)

2. THE STATES CANNOT, BY CONSTITUTIONAL PROVISIONS, LIMIT THE RIGHT OF THEIR LEGISLATURES TO RATIFY AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

We shall not discuss in detail the provisions contained in the Constitutions of Missouri, Tennessee, West Virginia, Texas and Rhode Island, which, according to the contention of plaintiffs in error, limit the right of the legislatures of those states to ratify amendments to the Constitution of the United States. We submit that the provisions in the Constitutions of West Virginia, Texas and Rhode Island will not bear the construction which the plaintiffs in error have sought to place upon them. In our view, however, this question is relatively unimportant. For we submit that, in the ratification of an amendment to the Federal Constitution, legislatures cannot be controlled by the provisions of state constitutions.

If they could be controlled in this way—by such provisions, for instance, as those contained in the constitutions of Tennessee and Missouri—the ratification of amendments by legislatures could be effectively prevent-

ed. The Constitution of Tennessee attempts to say *when* the legislature shall ratify, and, if it may say this, it may say that the legislature shall *never* ratify. The Constitution of Missouri attempts to say that amendments of a *certain character* shall not be ratified, and, if it may say this, it may say that *no* amendments shall be ratified. It is easy to perceive that such provisions in the constitutions of 13 states would, in effect, amend the Constitution of the United States by preventing Congress from resorting to one of the modes of obtaining ratification of amendments prescribed in Article V of that instrument.

The decisions of this Court show that such provisions of state constitutions are invalid.

The second paragraph of Section 1 of Article II of the Federal Constitution contains the following language:

> "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress * * * "

The effect of this provision was considered in *McPherson vs. Blacker*, 146 U. S., 1. The Court said (page 25):

> "The Constitution of the United States frequently refers to the States as a political community, and also in terms to the people of the several states and the citizens of each State. What is forbidden or required to be done by a State is forbidden or required of the legislative power under State constitutions as they exist. The clause under consideration does not read that the people or the citizens shall appoint, but that 'each State shall;' and if the words 'in such manner as the legislature thereof may direct' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of

those words, while *operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power*, cannot be held to operate as a limitation on that power itself." (Italics ours).

By Article V, the power of ratifying amendments is conferred upon the legislature, just as, by the language above quoted from Section 1 of Article II, the power of directing in what manner electors shall be appointed is conferred upon the legislature. In the one case, therefore, as in the other, the action of the legislature is free from any restraints which the constitution of the state may seek to impose.

In *Hawke vs. Smith*, 253 U. S. 221, this Court held that the State had no authority to require the submission of the ratification of a Federal amendment to a referendum under the State Constitution, and the Court said (page 230):

> "It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented.
>
> "This view of the amendment is confirmed in the history of its adoption found in 2 Watson on Constitution, 1301 et seq. Any other view might lead to endless confusion in the manner of ratification of Federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several States."

The plaintiffs in error, on page 105 of their brief, concede that the case last cited decided that a State could not make "the legislature's ratification conditional on its being approved by popular vote." It seems scarcely

logical to contend that a State which cannot make the legislature's ratification of an amendment dependent upon a condition can unconditionally forbid that legislature to ratify the amendment at all.

The case of *Haire vs. Rice*, 204 U. S. 291, cited by plaintiffs in error, does not support their contention. That case did not deal with a constitutional amendment. There an Act of Congress authorized the people of the Territory of Montana to choose delegates to a convention charged with the duty of forming a Constitution and State Government, and in the same act granted certain lands to the State of Montana, which was about to be formed, and provided that these lands should be disposed of in such manner as the Legislature might prescribe. The question presented was whether the Legislature, in the disposition of the lands so granted, could be controlled by a provision of the State Constitution, and the Court, in deciding this question, having looked at all of the provisions of the Act in order to ascertain the intention of Congress, held that Congress, having used this language in the Act in which "the people of the territory about to become a State, were authorized to choose delegates to a convention charged with the duty of forming a Constitution and State Government," must have intended to confer the power to dispose of these lands upon the Legislature created by the Constitution and subject to the limitations therein imposed on that Legislature. The construction placed by the Court upon that Act of Congress can have no bearing upon the instant case, in which the Court is concerned with the construction to be placed upon Article V of the Constitution.

The plaintiffs in error, on page 111 of their brief, use the following language:

"The assent of a particular State must be the free and voluntary act of the people of that State, however much it must conform to the method Article V has fixed."

Let us assume, for the moment, the correctness of this proposition. Will the action of the Legislature of a particular State more truly represent the will of the people of that State who elected the members of that Legislature, if the Legislature is free of constitutional restrictions, or if it is bound by the provisions of a constitution which may have been adopted before the birth of any member of the Legislature or of any of the people who elected that Legislature?

The answer to the proposition above quoted is, however, that the people of the several States, when they adopted the Constitution, conferred upon the Legislatures of the several States the power to act upon Federal amendments, untrammeled by the provisions of any State Constitution then in force or which might thereafter be adopted.

III.

CONCLUSION.

We submit that the Nineteenth Amendment does not come within any implied limitations upon the amending power, for there are no such limitations; that it does not come within the express limitation upon that power; that its validity is upheld by the precedent of the Fifteenth Amendment and the decisions thereunder; that it has in fact been ratified by the Legislatures of more than 36 States; that those Legislatures were competent

to ratify it; and that, therefore, the decision of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

ALEXANDER ARMSTRONG,

Attorney-General of Maryland,

LINDSAY C. SPENCER,

Assistant Attorney-General of Maryland,

For Defendants in Error and Respondents.

(Appendix attached.)

APPENDIX A

APPENDIX A.

HISTORY OF THE FIFTH ARTICLE.

5 Elliot's Debates.

(p. 155): "Tuesday, June 5.

"Gov. Livingston, of New Jersey, took his seat.

"In Committee of the Whole.
(p. 157):

"The thirteenth resolution, to the effect *that provision ought to be made for hereafter amending the system now to be established, without requiring the assent of the national Legislature*, being taken up,—

"Mr. Pinckney doubted the propriety or necessity of it.

"Mr. Gerry favored it. The novelty and difficulty of the experiment requires periodical revision. The prospect of such a revision would also give intermediate stability to the government. Nothing had yet happened in the states where this provision existed to prove its impropriety. The proposition was postponed for further consideration. * * * "

(p. 178): "Monday, June 11.

"Mr. Abraham Baldwin, from Georgia, took his seat.

"In Committee of the Whole.
(p. 182):

"The thirteenth resolution for amending the national Constitution, hereafter, without consent of the national legislature, being considered, several members did not see the necessity of the resolution at all, nor the propriety of making the consent of the national legislature unnecessary.

"Col. Mason urged the necessity of such a provision. The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments, therefore, will be necessary; and it will be better to provide for them in an easy, regular, and constitutional way, than to trust to change and violence. It would be improper to require the consent of the national legislature, because they may abuse their power, and refuse their assent on that very account. The opportunity for such an abuse may be the fault of the Constitution calling for amendment.

"Mr. Randolph enforced these arguments.

"The words 'without requiring consent of the national legislature' were postponed. The other provision in the clause passed, *nem. con.*"

(p. 530): "Monday, September 10.

"*In Convention.*—

"Mr. Gerry moved to reconsider Article 19, viz:

" 'On the application of the legislatures of two-thirds of the states in the Union, for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose.'

"This Constitution, he said, is to be paramount to the state constitutions. It follows, hence, from this article, that two-thirds of the states may obtain a convention, a majority of which can bind the Union to innovations that may subvert the state constitutions altogether. He asked whether this was a situation proper to be run into.

"Mr. Hamilton seconded the motion; but, he said, with a different view from Mr. Gerry. He did not object to

the consequences stated by Mr. Gerry. There was no greater evil in subjecting the people of the United States to the major voice, than the people of a particular state. It had been wished by many, and was much to have been desired, that an easier mode of introducing amendments had been provided by the Articles of the Confederation. It was equally desirable now, that an easy mode should be established for supplying defects which will probably appear in the new system. The mode proposed was not adequate. The state legislatures will not apply for alterations, but with a view to increase their own powers. The national legislature will be the first to perceive, and will be most sensible to, the necessity of amendments; and ought also to be empowered, whenever two-thirds of each branch should concur, to call a convention. There could be no danger in giving this power, as the people would finally decide in the case.

"Mr. Madison remarked on the vagueness of the terms, 'call a convention for the purpose,' as sufficient reason for reconsidering the article. How was a convention to be formed? By what rule decide? What the force of its acts?

"On the motion of Mr. Gerry, to reconsider,—

"Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, ay, 9; New Jersey, no, 1; New Hampshire, divided.

"Mr. Sherman moved to add to the article,—'or the legislature may propose amendments to the several states for their approbation; but no amendments shall be binding until consented to by the several states.'

"Mr. Gerry seconded the motion.

"Mr. Wilson moved to insert 'two-thirds of' before the words 'several states'; on which amendment to the motion of Mr. Sherman,—

"New Hampshire, Pennsylvania, Delaware, Maryland, Virginia, ay, 5; Massachusetts, Connecticut, New Jersey, North Carolina, South Carolina, Georgia, no, 6.

"Mr. Wilson then moved to insert 'three-fourths of' before 'the several states'; which was agreed to, *nem. con.*

"Mr. Madison moved to postpone the consideration of the amended proposition, in order to take up the following:

" 'The legislature of the United States, whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid, to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths, at least, of the legislatures of the several states, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the legislature of the United States.'

"Mr. Hamilton seconded the motion.

"Mr. Rutledge said he never could agree to give a power by which the articles relating to slaves might be altered by the states not interested in that property and prejudiced against it. In order to obviate this objection, these words were added to the proposition:

" 'provided that no amendments, which may be made prior to the year 1808, shall in any manner affect the fourth and fifth sections of the seventh article.'

"The postponement being agreed to,—

"On the question on the proposition of Mr. Madison and Mr. Hamilton, as amended,—

"Massachusetts, Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, ay, 9; Delaware, no, 1; New Hampshire, divided."

(p. 546): "Saturday, September 15.

"*In Convention.*—

(p. 551): "Art. 5.

"'The Congress, whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose, amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths at least of the legislatures of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the ninth section of Article 1.'

"Mr. Sherman expressed his fears that three-fourths of the states might be brought to do things fatal to particular states; as abolishing them altogether, or depriving them of their equality in the Senate. He thought it reasonable that the proviso in favor of the states importing slaves should be extended, so as to provide that no state should be affected in its internal police, or deprived of its equality in the Senate.

"Col. Mason thought the plan of amending the constitution exceptionable and dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the government should become oppressive, as he verily believed would be the case.

"Mr. Gouverneur Morris and Mr. Gerry moved to amend the article, so as to require a convention on application of two-thirds of the states.

"Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the states, as to call a convention on the like application. He saw no objection, however, against providing for a convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum, &c., which in constitutional regulations ought to be as much as possible avoided.

"The motion of Gouverneur Morris and Mr. Gerry was agreed to, *nem. con.*

"Mr. Sherman moved to strike out of Article 5, after 'legislatures,' the words 'of three-fourths,' and so after the word 'conventions,' leaving future conventions to act in this matter, like the present convention, according to circumstances.

"On this motion,—

"Massachusetts, Connecticut, New Jersey, ay, 3; Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, no, 7; New Hampshire, divided.

"Mr. Gerry moved to strike out the words, 'or by conventions in three-fourths thereof.' On which motion,—

"Connecticut, ay, 1; New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, no, 10.

"Mr. Sherman moved, according to his idea above expressed, to annex to the end of the article a further proviso,—'that no state shall, without its consent, be affected in its internal police, or deprived of its equal suffrage in the senate.'

"Mr. Madison: Begin with these special provisos, and every state will insist on them, for their boundaries, exports, etc.

"On the motion of Mr. Sherman,—

"Connecticut, New Jersey, Delaware, ay, 3; New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, no, 8.

"Mr. Sherman then moved to strike out Article V altogether.

"Mr. Brearly seconded the motion; on which,—

"Connecticut, New Jersey, ay, 2; New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, no, 8; Delaware, divided.

"Mr. Gouverneur Morris moved to annex a further proviso,—

"'that no state, without its consent, shall be deprived of its equal suffrage in the Senate.'

"This motion, being dictated by the circulating murmurs of the small states, was agreed to without debate, no one opposing it, or, on the question, saying no."

In the Supreme Court of the United States

OCTOBER TERM, 1921.

No. 553.

OSCAR LESER, ET AL.,
PLAINTIFFS IN ERROR,

versus

J. MERCER GARNETT, ET AL.,
DEFENDANTS IN ERROR.

ON ERROR AND PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

CONDENSED BRIEF FOR PLAINTIFFS IN ERROR.

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TABLE OF CASES.

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In the original brief submitted by counsel for the Plaintiffs in Error it was found necessary to go into a number of matters, many of them of an historical character, in considerable detail.

It was thought that this ought to be done for the reason that this Court would naturally not care to adjudicate such a question as is involved in this case, viz: the question of whether or not there is any limit to the power to adopt amendments or make changes in

our governmental system, delegated to certain agents, to wit: two-thirds of a quorum of the two Houses of Congress and a majority of a quorum of thirty-six State Legislatures, by the people of the several States in Article V of the Federal Constitution, without having before it the fullest information.

The result has been, however, to make that brief so long that we have felt it might be an aid to the Court to have the main questions involved in this cause presented in a separate brief in a somewhat more condensed form, and the following is therefore respectfully submitted:

STATEMENT OF THE CASE.

This case comes to this Court upon a writ of error to the Court of Appeals of Maryland, (and also upon petition for writ of certiorari) to review a judgment of that Court affirming a judgment of the Court of Common Pleas of Baltimore City, wherein the latter Court denied the petition of Plaintiffs in Error, citizens and voters of the State of Maryland, constituting the organization known as the "Maryland League for State Defense," for an order commanding the Defendants in Error, constituting the Board of Registry of a certain precinct, to strike from the list of qualified voters the names of two women who had been registered by said Board over the protest of one of the petitioners.

The original proceeding was taken by the Petitioners in pursuance of the authority so to do given by the Maryland Statutes, and the Court of Appeals of Maryland held that the Court below had full jurisdiction in the premises.

The Defendants in Error, the Board of Registry, claimed the right to register these women by virtue of the authority conferred upon them as officers of registration of the State of Maryland by the alleged Nineteenth Amendment to the Constitution of the United States.

The Plaintiffs in Error, on the other hand, claimed that said alleged Nineteenth Amendment was repugnant to the Constitution and especially to the proviso of Article V thereof, forbidding the adoption of any amendment whereby the State of Maryland, *as that State was constituted prior to the proclaiming of said amendment,* was deprived without its consent of its suffrage in the Senate. They also claimed the right not to have their right to vote diminished in value,—half taken away by an amendment like the Nineteenth,—on the ground that such an amendment was forbidden by Article V of the Constitution.

The Court of Common Pleas denied these contentions of the Plaintiffs in Error, holding that the power to adopt amendments to the Constitution delegated to Congress and the said State Legislatures was practically without limit, saying, "This Court is of opinion that the power of amendment of the Federal Constitution is substantially unlimited" (Record, p. 21).

The Court of Appeals of Maryland in affirming the judgment of the Court of Common Pleas held that by reason of the similarity of the Nineteenth Amendment to the Fifteenth, the decisions of this Court in which it had recognized the Fifteenth Amendment as being validly a part of the Constitution constituted a prece-

dent binding upon the Court of Appeals which precluded it from considering the argument that the Nineteenth Amendment was beyond the scope of the amending power conferred in Article V, or forbidden by Article V, and therefore expressed no opinion regarding the validity of those arguments further than to say that if the question were an open one it would feel bound to recognize their force (Record, p. 156).

The Plaintiffs in Error made the further contention that, assuming that the Nineteenth Amendment was not beyond the scope of the amending power, it has never been legally ratified by the requisite number of the State Legislatures, that is to say, by the Legislatures of thirty-six of the States. This contention was also denied by the Board of Registry and the Court of Common Pleas, and the judgment of the Court below in that respect was affirmed by the Court of Appeals.

Upon this state of the case we submit the following propositions:

PROPOSITION I.

The so-called 19th Amendment is totally void because the adoption of such an amendment is not within the scope of the power to adopt amendments to the Federal Constitution which was DELEGATED by the people in adopting that Constitution (in Article V thereof) to Congress and the Legislatures of three-fourths of the States, for the reason that the power to adopt such an amendment as this would mean the power to add to or subtract from the electorate of a State without the consent of its people to such an extent as to totally destroy the State—the autonomy of the State as a political body "possessing all the functions essential to a separate and independent existence"—thus defeating the very purpose which the people had in adopting the Constitution,

which was to establish a perpetual union of "such States"—an indestructible union of indestructible States.

PROPOSITION II.

The decision of this Court in the case of Rhode Island vs. Palmer, wherein it was held that the 18th or Prohibition Amendment was within the scope of the amending power granted in Article V constitutes no precedent for holding valid the 19th Amendment. The 18th Amendment did not attack or interfere with the GOVERNMENT of the State—"the structure of the State Government"—or deprive it of any function "ESSENTIAL TO ITS SEPARATE AND INDEPENDENT EXISTENCE."

PROPOSITION III.

The adoption of such an amendment as the 19th is forbidden by the EXPRESS limitation contained in Article V, viz.: That "no State WITHOUT ITS CONSENT shall be deprived of its equal SUFFRAGE in the Senate"; in that the State of Maryland, as that State was constituted prior to the submission of this amendment, is deprived altogether of its suffrage in the Senate and will be represented hereafter in the Senate by persons not of its own choosing, i. e., by Senators chosen by voters whom the State itself has not authorized to vote for Senators.

PROPOSITION IV.

The prohibition against the adoption of any amendment whereby a State is deprived of its equal suffrage in the Senate without its consent involves two things—first, that if the State chooses to consent it MAY be deprived of its equal suffrage in the Senate; and, second, THAT IT MAY NOT BY ANY AMENDMENT BE DEPRIVED OF ITS POWER TO GIVE OR REFUSE ITS CONSENT.

PROPOSITION V.

The various cases decided by this Court since the Civil War, including the case of Myers vs. Anderson, 238 U. S.

368, in which, without going at all into the question of the scope and limits of the amending power granted in Article V, this Court nevertheless then recognized the Fifteenth Amendment as being in effect valid as a part of the Constitution, constitute no precedents for holding the Nineteenth Amendment valid, for the reason that any amendment, however radical, which has received the unanimous assent of the States—has been, in fact, consented to, however reluctantly, by each and all of them, is valid and had to be accepted by this Court as being valid when the question of its validity was raised for the first time in Myers vs. Anderson, forty-five years after its adoption, no State nor any citizens of any State having ever disputed its validity prior to that case.

PROPOSITION VI.

The Nineteenth Amendment has never been legally ratified by the requisite number of States, even assuming that the State Legislatures are competent to ratify an amendment like the Nineteenth, which radically changes, and, in fact, nullifies so vital a part of their State Constitution as that which limits the right of suffrage to men, by conferring it upon women. Neither Tennessee nor West Virginia ever ratified at all.

ARGUMENT.

PROPOSITION I.

The so-called 19th Amendment is totally void because the adoption of such an amendment is not within the scope of the power to adopt amendments to the Federal Constitution which was DELEGATED by the people in adopting that Constitution (in Article V thereof) to Congress and the Legislatures of three-fourths of the States, for the reason that the power to adopt such an amendment as this would mean the power to add to or subtract from the electorate of a State without the consent of its people to such an extent as to totally destroy the State—the autonomy of the State as a

political body "possessing all the functions essential to a separate and independent existence"—thus defeating the very purpose which the people had in adopting the Constitution, which was to establish a perpetual union of "such States"—an indestructible union of indestructible States.

The only power to adopt amendments to the Federal Constitution which Congress and the Legislatures of three-fourths of the States have is that which was conferred upon these agents by the people of the respective States when they adopted Article V of the original Constitution.

> "ARTICLE V: The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for *proposing* Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, *when* ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State *without its Consent,* shall be deprived of its equal *Suffrage* in the Senate."

The original Constitution, including this Article, was adopted by the *people* of the several States through Conventions elected by them in each State, and no question is made here as to the right of the people in the same way to adopt an amendment of this kind or

any other amendment they might see fit to adopt. Or to abolish the Federal Government altogether, repeal the Constitution and thus put an end to the Union. Or, for that matter, to abolish all the State Governments and confer all political power upon a central authority. Because the people of the several States in Conventions assembled,—the people of each State joining with the people of all the other States,—are legally omnipotent like the British Parliament. In them,—and in them alone,—resides the ultimate sovereignty,—the power which acknowledges no limit except its own will.

But the question here is whether this sovereign people, or to be more accurate, these sovereign peoples of the several States, did or did not *delegate* to their agents named in Article V, to wit: Congress and the Legislatures of three-fourths of the several States, the power to adopt such an "amendment" as this.

That the power to amend the Constitution contained in Article V is a *delegated* power is not open to question:

> "The Fifth Article *is a grant of authority by the people to Congress.* The determination of the method of ratification is the exercise of a national power *specifically granted* by the Constitution. That power *is conferred upon Congress* and is *limited* to two methods of action, by the Legislatures of three-fourths of the States, or by conventions in a like number of States."
>
> Hawke vs. Smith, 253 U. S. 221, 227.

The power to adopt amendments under Article V is a "delegated" power.

Dodge vs. Woolsey, 18 How. p. 348.

The only question is whether or not the power to adopt amendments thus delegated goes to the extent of authorizing the adoption of such an amendment as the Nineteenth.

The answer to that question, of course, depends upon the construction which this Court shall place upon the language employed in Article V. This Article grants the power to "amend" in *general* terms. All we need ask the Court to do in this case is to apply the same rule of interpretation to this grant of power which it has always applied to the construction of powers granted by the people to other agencies of government in the Constitution, and that rule is, as we will soon see, merely the rule universally applicable to the construction of all written instruments.

It has been stated by this Court as follows:

> "Nor can it be questioned that, when investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the *objects* for which those powers were granted. *This is a universal rule of construction applied alike to statutes, wills, contracts, and constitutions.* If the *general purpose* of the instrument is ascertained, the language of its provisions must be construed with reference to *that purpose* and so as to subserve it. In no other way can the intent of the framers of the instrument be discovered." (Italics ours.)

Legal Tender Cases, 12 Wall. 457, at p. 531.

"The great and leading intent of the Constitution must be kept constantly in view upon the examination of every question of construction."

Ex parte Yerger, 8 Wall. 85, at p. 101.

What then was the "general purpose"? What "the great and leading intent" of the people in adopting the Federal Constitution? That it was their intention to establish a Union of the several States under a Federal Government is of course patent. Whether they intended that that Union should be perpetual or that any number of its members less than the whole would be authorized *by the Constitution itself* to put an end to the Union was a question which was at one time subject of high debate in this country. We had supposed that that debate had ended at Appomattox, and that the question had been finally put at rest by the decisions of this Court which followed.

The view of this question finally adopted and expounded by this Court was clearly foreshadowed by Mr. Lincoln in his first inaugural address:

> "I hold that in contemplation of universal law and of the Constitution the Union of these States is perpetual. *Perpetuity is implied if not expressed* in the fundamental law of all national governments. It is safe to say that no government ever had a provision in its organic law *for its own termination.* Continue to execute all the express provisions of our National Government and the Union will endure forever,—it being impossible to destroy it *except by some action not provided for in the instrument itself.*"

And again:

> "But if destruction of the Union by one or *a part only of the States* be lawfully possible, the Union is less perfect than before, the Constitution having lost the vital element of perpetuity."

And accordingly in a series of decisions rendered soon after the Civil War, this Court established the doctrine thus propounded by Mr. Lincoln, that the Union was intended to be a perpetual Union,—"an indestructible Union of indestructible States," and that no power was conferred upon any of the agencies of government provided for in the instrument to defeat that intention,—that "great and leading intent" of the people, by destroying any one or more of the States by taking away in whole or in part any one of the *"functions essential to their separate and independent existence"* as States.

In the cases of Lane County vs. Oregon, 7 Wall. 71, and Texas vs. White, 7 Wall. 700, this great principle of constitutional interpretation is expounded in language which cannot be misunderstood, and it is there held that it was the intention of the people in adopting the Constitution not only to establish a perpetual Union of States, but more specifically of States, each one of which should be immune from any interference with or even *"crippling"* of any of the functions essential to its separate and independent existence as a State.

> "And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed *with all the functions essential to separate and independent existence,'* and that 'without the

> States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and *independent autonomy* to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, *in all its provisions,* looks to an *indestructible Union composed of indestructible States."* (Italics ours.)
>
> Texas vs. White, 7 Wall. 700, at pp. 724-25.

Now, obviously Article V, which is one of the "provisions" of this Constitution, must be so construed as not to defeat the main purpose of the Constitution itself. But if, under that Article, an "amendment" like the Nineteenth may be adopted which takes away from the people of the State of Maryland or any other State, without its *consent,* the right to say who shall vote at its own State elections, and compels the people of that State to permit an equal or greater number of *other* people to participate in its State elections (or in the selection of its Senators), what becomes of the "independent autonomy" of the State? How can such a construction be put upon this Article unless this Court is prepared to retract what it said in Texas vs. White, viz: "Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, etc."?

Again this Court has said in the same opinion:

> "A State, in the ordinary sense of the Constitution, is a *political* community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of *such* States, under a common Constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, etc." (Italics ours.)
>
> Texas vs. White, 7 Wall. 721.

In other words, it was the intention of the people who adopted the Constitution to establish a perpetual Union of States, each one of which should have a government established with the consent of the governed, that is, their own government constituted of officials of their own selection and possessing "all the functions essential to separate and independent existence."

> "The National Constitution * * * assumed that the government and the Union which it created, and the States which were incorporated into the Union, would be indestructible and perpetual; and as far as human means could accomplish such a work, *it intended to make them so.*"
>
> White vs. Hart, 13 Wall. 646, 650.

How is this intention on the part of the people reconciled with the intention at the same time to authorize amendments to be adopted to this Constitution by some States which would regulate the electorate of non-consenting States? No sane man can deny that the right to determine for itself who shall vote at its own State elections, who shall select the persons who are to exercise the powers of government in the State,—is one of

"the functions essential to separate and independent existence." How can a State be said to have a "separate and *independent* existence" if *other* States have the constitutional right and power, by ratifying an amendment to the Federal Constitution, or by any other methods, to force upon the people of that State an electorate different from that which those people themselves have created in their State Constitutions? It must be obvious that in that case the continued existence depends upon the will of Congress and these other States.

What is a "State" within the meaning of the Constitution? It is certainly not merely a piece of territory. It is certainly not a mere collection of people. It is, as this Court has said in the case above cited, "a *political* community." Who *constitute* the State in that sense? Clearly the people who exercise the *political* power. That is to say, the *electorate* and those whom the electors of a State choose to clothe with the governmental power of the State. *They* constitute the State. They *are* the State. So for all political purposes,—all such purposes as we are now considering,—there may be numerous persons residing in a State who constitute no part of this *body politic*, because they have no share in the exercise of any of the functions of the government,—not being a part of the electorate until admitted by that electorate to share in the suffrage.

When an amendment is adopted, therefore, which changes the electorate, the original State is destroyed and a new State created. That is exactly the *de facto* effect of this Suffrage Amendment. The State of Maryland as that State was constituted prior to the

proclamation of this amendment, no longer exists. It is no longer the same political community. *Its public officials are not responsible to the same constituency.* Of course, after an amendment to the Federal Constitution has been officially proclaimed by the Federal authorities as having been lawfully adopted, all State *officials* are compelled to obey it, and recognize it as being validly a part of the Constitution and binding upon them until such time as this Court shall declare it void.

> "This judicial power as recognized in the United States must therefore remain dormant and legislative acts must be obeyed; any one, as a public official refuses obedience at his peril until some one's individual case is brought before the Court for judgment and decided."
>
> The Judiciary and The People, by Frederick N. Judson, p. 106.

Hence it is that all the State officials being under the dominion of this newly created "political community" are no longer in a position to represent or speak for the original State of Maryland,—not even the Attorney-General. And hence it is that individual citizens of that State, the Petitioners and Plaintiffs in Error in this case, organized under the name of the Maryland League for State Defense, have been compelled to institute these proceedings to vindicate the right to continued existence of the original State of Maryland.

The situation of the State of Maryland in this matter would seem to be not unlike that of a corporation which has a cause of action against persons claiming

to have rights in conflict with the charter rights of its stockholders.

Ordinarily the board of directors and officers of the corporation are the proper persons to institute proceedings necessary to enforce that cause of action,—the rights of the corporation. But when it appears that the parties against whom the cause of action is to be enforced have secured control of the board of directors of the corporation by virtue of having the ownership or control of a majority of its capital stock, or by any other means, then the individual stockholders of the corporation may vindicate the rights of the corporation by proceeding in their own names in its behalf.

It is to be noted that the Honorable Alexander Armstrong appears as counsel for the Board of Registry, the Defendants in this case, but the Court will not make the mistake of supposing that in doing so he has any authority to speak for the State of Maryland.

The only official authority which he can claim to have for appearing for that Board of Registry is found in the laws of Maryland enacted long before the Nineteenth Amendment was ever proposed, making it part of the official duty of the Attorney-General to defend suits instituted against the Boards of Registry. This law was, of course, enacted in recognition of the hardships which would ensue if a citizen could be compelled to serve as a member of a public board and also compelled to employ private counsel to defend his official acts.

So far from having any authority from the *State of Maryland* to represent *it* in making the contentions which are being made on behalf of the Defendants in the effort to establish the validity of the Nineteenth Amendment, whereby that State is forced to admit to the right of suffrage a class of voters which it was unwilling to have vote at its elections, the fact is, that the Legislature of Maryland, to which body the question of approving or rejecting the amendment submitted by Congress had been referred, adopted resolutions in which they not only refused to ratify the amendment, but refused in the most emphatic terms, and in the resolutions of rejection make the following declarations:

> "It is manifest, therefore, that when the people, in this same Federal Constitution, conferred upon Congress and the Legislatures of three-fourths of the States the power to 'amend' that Constitution, it could not have been their intention to authorize the adoption of any amendment or any measure under the guise of an amendment, which would wholly or partially destroy the States, by taking away from the States any one of their functions essential to their separate and independent existence as States.
>
> "The right of a State to determine for itself by the vote of its own people, who shall vote at its own state, county and municipal elections is one of those functions.
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> * * * * * *
>
> "Resolved Further, That the General Assembly of Maryland could not exercise the power to ratify this so-called Nineteenth Amendment, conferred upon it, or supposed to be conferred upon it, by the Fifth Article of the Constitution of the United

States, without violating, in most flagrant fashion, the Constitution of our own State.

* * * * * *

"We conceive that the members of this General Assembly would be false to their duty to their own people, if not to their official oaths, if they should vote to ratify the proposed amendment." (Record, p. 9).

It is true that after the proclaiming by the Secretary of State of the amendment as having become a part of the Constitution of the United States, the Legislature of Maryland, in a special session, recognizing that until such time as the amendment should be declared void by this Court it must be obeyed by all persons in official position at their peril, and that for that reason the officers of registry and officers of elections would have to register all the women who should apply for registration, and that the officers of elections would have to permit all registered women to vote, passed an act providing facilities in the shape of increased number of election precincts and registration and election officers to enable the voting to be done in a proper and orderly manner.

But it is to be noted that at the *same session* that Legislature, notwithstanding the tremendous pressure put upon it by the advocates of the amendment, rejected the resolution to rescind their previous action by the same majority by which it had rejected the amendment, and left the resolution which it had adopted, from which we have just above quoted, still in full force and effect.

Therefore, of course, while Mr. Armstrong may have a perfect right to represent the Board of Registry, we assume, of course, that he will not assume the right to speak for the State of Maryland in this cause.

But even if it could be thought that the effect of *this* amendment is not what we claim it to be, viz: To destroy the original political body known as the State of Maryland and substitute a new State under the same name, thereby destroying the old "indestructible" State and making a new one, nevertheless, it cannot be denied that if the power to adopt amendments *changing the electorate* at all exists, it is impossible to draw the line at any point short of a change which *will,* manifestly, destroy the State, as for instance, amendments which abolish the present electorate altogether and confer the right to elect State officials upon other persons, or some one other person.

> "Questions of power do not depend upon the degree to which they may be exercised in the particular case."
>
> Opinion of Chief Justice MARSHALL in Brown vs. Maryland, 12 Wheaton 419, 439.

The test of the validity of a power is not how it is *probable* that it may be exercised in particular cases, but *what can be done under it.*

Keller vs. United States, 213 U. S. 138, 148.

What is it that may not be done under this power to change the electorate of the State without the consent of that electorate,—if the power exists at all under

Article V? If this Court were to hold the Nineteenth Amendment valid it could not hold invalid a subsequent amendment, which, instead of taking away *half* of the voting power of the men qualified to vote under the Constitution of the State, as this amendment does, should take away *all* of that power and make the State a body politic composed of women alone, without acting in an arbitrary manner and in total disregard of the established doctrine of *stare decisis*,—a doctrine without the recognition of which, at any rate in a reasonable degree, we have no such thing as a government of law as distinguished from a government of men,—a personal and arbitrary government.

And we know that this Court has always given careful regard to this principle in construing similar grants of power contained in the Constitution.

The language in which the power to adopt amendments is granted to Congress and the State Legislatures in Article V of the Constitution is certainly no broader than that in which the power to levy and collect taxes is granted to Congress in Section 8 of Article I, which provides as follows:

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

In the same Article there is an express provision:

> "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

And:

> "No Tax or Duty shall be laid on Articles exported from any State."

In other words, three express limitations on the taxing power granted. Yet this Court held, in the case of Collector vs. Day, 11 Wall. 113, that it would not construe this language, broad as it was, as sufficient to authorize Congress to levy a tax upon the salary of a State Judge, for the same reason that we contend that similar language in Article V should not be construed to authorize Congress and the State Legislatures to adopt an amendment changing the electorate or any part of the governmental structure of a State. In that case the question was whether this power to "lay and collect taxes, duties, etc., to pay the debts and provide for the common defence and general welfare of the United States," conferred on Congress by the section above quoted authorized the laying of a tax, however small, upon the salary of a State official,—in this case a State judge.

Notwithstanding the broad and general terms in which this taxing power had been conferred, it was held that it did not, the ground of the decision being that the right and power to establish and maintain a judiciary was necessary to the existence of a State, that is, such a State as is contemplated by the Constitution; that if any authority outside of the State, such as Congress or the Legislatures of other States, had the power to tax the salaries of judges, it might tax the judiciary out of existence, and thus *destroy* the State, and that, inasmuch as the people in adopting the Con-

stitution intended to establish a union of *indestructible* States, they could not have intended *even by the broad and general language of this Article* to authorize Congress to levy such a tax. In its opinion the Court says:

> "The cases of McCulloch vs. Maryland, and Weston vs. Charleston, were referred to as settling the principle that governed the case, namely, 'that the State governments cannot lay a tax upon the constitutional means employed by the Government of the Union to execute its constitutional powers.'
>
> "The soundness of this principle is happily illustrated by the Chief Justice in McCulloch vs. Maryland. 'If the States,' he observes, 'may tax one instrument employed by the Government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax judicial process; they may tax all the means employed by the Government to an excess which would defeat all the ends of government.' 'This,' he observes, 'was not intended by the American people. They did not design to make their Government dependent on the States.' (And it must be equally true that the American people did not design to make any of the States dependent for their existence as republics—as States with a republican form of government—upon the will of any particular number of States.)
>
> "Again, 'That the power of taxing it (the bank) by the States may be exercised so far as to destroy it, is too obvious to be denied.' * * * 'If the right to impose the tax exists, it is a right which, in its nature, acknowledges no limits. * * *'
>
> "* * * Upon looking into the Constitution it will be found that but a few of the Articles in that instrument could be carried into practical effect without the existence of the States.

"* * * The Constitution guarantees to the States a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary, consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be *crippled,* much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax.

* * * Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might.

"* * * *It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States,* nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon *necessary implication,* and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, *can exist only at the mercy of that government.* Of what avail are these means if another power may tax them at discretion?" (Italics ours.)

Collector vs. Day, 11 Wall. 113.

This case would seem to be conclusive of the question before us. For if the power to maintain a judiciary whose salaries shall be exempt from taxation by the Federal Congress be one of the "functions essential to the existence" of a State of the Union, a power without which it would not be an indestructible State, surely the power to determine for itself, by the voice of its own voters, who shall and who shall not vote in the election of that judiciary is not less so.

It is argued that there is no provision in the Constitution forbidding the submission, or the ratification by State Legislatures of an amendment whereby the States shall be forced to admit to the elective franchise in their State elections an equal or greater number of other people whom they are not willing to have vote, but even if there were no such provision, as said in Collector vs. Day, their exemption from such an amendment "rests upon *necessary implication,* and is upheld by the great law of self-preservation," as any government the persons who elect which can be selected and determined by another and distinct government can exist only "at the mercy" of that government, that is, is not "indestructible."

The right of a people to select the persons who are to make and to administer their laws is what constitutes them a "political community of free citizens" and entitles them to be called a State. For (to paraphrase again the language of Collector vs. Day), of what avail is the right to elect their own State officers, if another power outside the State, that is, Congress and the Legislatures of other States, may take that right away at its discretion?

If this "other power" has the right to say that women shall vote at State elections in States like Virginia and Maryland, which have rejected this Suffrage Amendment, it would have equally the right to say that *men* shall *not* vote in those States or that only *certain* men or certain women shall vote. What, then, becomes of those States? Can they be said to be indestructible States if their continued existence is thus "at the mercy" of another? Or could such a State be said to be still "a political community of free citizens with a government established by the consent of the governed"?

It may be argued, perhaps, that the fact that there are two express limitations upon the amending power contained in Article V indicates that that power was intended to be unlimited in other respects.

It might be a sufficient answer to that contention to say that the maxim *"expressio unius exclusio alterius,"* while sometimes very persuasive, is never conclusive as a rule of interpretation, and that, before adopting it in so doubtful a matter as this, the Courts would certainly look to the consequences which might follow such an interpretation of Article V, as we have endeavored to point out those consequences or some of them in this argument, and, viewing those consequences, would be governed by the principle so forcibly stated by Mr. Justice MILLER in his great opinion in the Slaughter-House cases, as follows:

16 Wall. 36, 78.

> "The argument we admit is not always the most conclusive which is drawn from the consequences

> urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both of these governments to the people; the argument has a force that is irresistible, in *the absence of language which expresses such a purpose too clearly to admit of doubt.*" (Italics ours.)

Surely it cannot be said that Article V confers upon Congress and the State Legislatures, or three-fourths of them, the power thus to destroy the "indestructible Union of indestructible States" in language which ex-expresses such a purpose "too clearly to admit of doubt."

But perhaps a more conclusive answer to this contention will be found in the fact that the Supreme Court turned down the same argument when made for a like construction of the Taxing Clause of the Constitution, in Collector vs. Day (*supra*).

For it will be remembered that while Section 8 of Article I confers upon Congress the "power to lay and collect taxes" in general terms, there are several other *express* exceptions or limitations on this taxing power contained in this Article; such as the provisions that

"No capitation or other direct tax shall be laid unless in proportion to the census or enumeration," etc., and that "No tax or duty shall be laid on articles exported from any State." Nevertheless the general power "to lay and collect taxes," as we have already seen, was held not to include the power to lay a tax on the salary of a State judge.

The rule of construction announced in Collector vs. Day has been reaffirmed by this Court in the recent case of Evans vs. Gore, 253 U. S. 245, involving the construction of the Sixteenth Amendment, which provides for the taxing of incomes "from whatever source derived,"—language even broader and more explicit than that of either the taxing clause or the amending clause. In that case the Court said:

> "True, the taxing power is comprehensive and acknowledges few exceptions. But that there are exceptions, besides the one we here recognize and sustain, is well settled. In Collector vs. Day, 11 Wall. 113, it was held that Congress could not impose an income tax in respect of the salary of a judge of a State Court; in Pollock vs. Farmers Loan and Trust Co., 157 U. S. 429, 585, 601, 652, 653, it was held—the full Court agreeing on this point—that Congress was without power to impose such a tax in respect of interest received from bonds issued by a State or any of its counties or municipalities; and in United States vs. Railroad Co., 17 Wall. 322, there was a like holding as to municipal revenues derived by the City of Baltimore from its ownership of stock in a railroad company. None of those decisions was put on any express prohibition in the Constitution, for there is none, but all recognized and gave effect to a prohibition implied from the independence of the States within their own spheres."

No power granted by the Constitution, in whatever language, has heretofore been held sufficient, directly or indirectly, to destroy the States without whose existence we would "disappear from among the family of nations."

PROPOSITION II.

The decision of this Court in the case of Rhode Island vs. Palmer, wherein it was held that the 18th or Prohibition Amendment was within the scope of the amending power granted in Article V constitutes no precedent for holding valid the 19th Amendment. The 18th Amendment did not attack or interfere with the GOVERNMENT of the State—"the structure of the State Government"—or deprive it of any function "ESSENTIAL TO ITS SEPARATE AND INDEPENDENT EXISTENCE."

It is true that the so-called Prohibition or 18th Amendment marked a new stage in the development of American constitutional government, and that it transferred from the exclusive domain of State legislation to the domain of national legislation the right to make laws regulating the manufacture and sale of intoxicating liquors, thereby diminishing to that extent the legislative power of the State and enlarging the grant of legislative power to the Federal Government. As to the wisdom of such an amendment a violent controversy is now raging and may continue to rage for a long time to come.

But with that controversy we have no concern in this case.

Many arguments were made against the validity of that 18th Amendment.

But the argument which is made here against the validity of the 19th Amendment could not be made against the 18th.

That amendment did not in the slightest degree affect the independent existence of the State.

It did not undertake to interfere in any way with the governmental structure of the State. It did not undertake in any way to interfere with the right of the people of each State to determine by their own votes who should elect their own government officials; who should *govern the* State. In other words, it did not undertake to interfere, as this 19th Amendment does, in any way with the *electorate.*

It confined itself to doing the same kind of thing which had been done in the original Constitution,—that is, transferring from the States to the Federal Government a certain subject of legislation which it was thought could be better dealt with by the Federal Government than the State governments. The original Constitution took away from the States with their consent, it is true, the power to make laws on a good many subjects which had previously been within their exclusive jurisdiction, such as the right to make treaties, to levy taxes on imports and exports, etc.

It had a good deal to say as to what a State might do or not do, but it had not a word to say as to what a State should *be,* what persons in the State should exercise the functions or discharge the powers of government—in other words, who should *constitute* the State, except that a republican form of government was

guaranteed to each State, and a guarantee of a republican form of government is simply a guarantee of a right to self-government, the right of the people in a State already in existence and legally constituted to determine for themselves who shall govern them and by what methods. It must have been clearly recognized in that case that the 18th Amendment was obnoxious to no such objection; and, indeed, it was upon that ground that its validity was sought to be maintained by the counsel for the United States, as would appear from the following extract from the brief filed by the Honorable Alexander C. King, Solicitor General:

> "It is idle in this case to suggest that this power of amendment might be used *to change the form of the Government*. This amendment suggests no such thing. It simply transfers a power exercised by the State governments to be exercised by the Federal Government. It leaves the *structure* of the State governments and their general purposes and those of the Federal Government unaltered."
>
> Brief of Defendants in support of motion to dismiss in case of Rhode Island vs. A. Mitchell Palmer, Attorney General, pages 44-45.

Whatever other objections there might have been to the validity of the 18th Amendment, it could not be said that it in any way tended to deprive any State of any of "the functions essential to its separate and independent existence" as a State. Certainly, the power to regulate the liquor business, however important, cannot be said to be one of those functions essential to the separate and independent existence of a State.

But no man will deny that the right of a State to determine for itself who shall vote at its own elections, who shall exercise either directly or through duly elected officials all the powers of government—in other words, who shall *constitute* the State—is one of the functions essential to its independent existence as a State.

PROPOSITION III.

The adoption of such an amendment as the 19th is forbidden by the EXPRESS limitation contained in Article V, viz.: That "no State WITHOUT ITS CONSENT shall be deprived of its equal SUFFRAGE in the Senate"; in that the State of Maryland, as that State was constituted prior to the submission of this amendment, is deprived altogether of its suffrage in the Senate and will be represented hereafter in the Senate by persons not of its own choosing, i. e., by Senators chosen by voters whom the State itself has not authorized to vote for Senators.

This is from many points of view the most important provision in the Constitution of the United States. It is the clause which was the result of the longest and fiercest controversy between the representatives of the large States and the small States in the Convention which adopted the Constitution.

The history of the controversy which resulted in the engrafting upon Article V of this guarantee to the States in perpetuity of equal suffrage in the Senate will be found set forth at length in our original brief, beginning at page 49, under the head of "Express Limits of the Amending Power, (a) History of the Proviso."

Without a knowledge and present keeping in mind of that history it is impossible to realize the full meaning, purport and effect of that clause.

It is well described by Mr. Madison in No. 43 of the Federalist, page 204, as *"a palladium to the residuary sovereignty of the States"* and it is manifest from the history of the debates and discussions preserved by Curtis in his "History of the Constitution," and in Elliott's Debates, as quoted in our brief, that if the larger States had not ultimately yielded their assent to the adoption of this principle the convention would have adjourned without adopting any Constitution at all. A study of this history is particularly necessary in order to enable us to understand what was meant by the word "suffrage" as used in this clause.

It appears that at an early stage of the controversy the larger States, like Virginia (which owned all the territory covered at present by Kentucky and West Virginia), Pennsylvania and Massachusetts, desired *that the Senators should be elected by the House of Representatives from a list furnished.*

This was the Virginia Plan, so-called, proposed by Mr. Madison. This, of course, would have left the larger and more populous States in complete control of both branches of the Federal Legislature. It was not until this point had been yielded, and it had been finally agreed that each State should select its own Senators and that the States should have equal voting power in the Senate that the controversy ended and the settlement was reached.

It was provided in the original Constitution that these Senators should be selected by the State Legislatures, whereas under the recently adopted 17th Amendment the people of each State vote directly for

their Senators. In either case they are equally the choice of the electors, the people *whom the State itself has seen fit to clothe with the right to vote.* Now, it must be manifest that if amendments to the Constitution, like the 19th, may be lawfully adopted whereby and wherein persons may be designated, or classes of persons may be designated, in a State, to whom shall be given the right to select Senators, these Senators will be no longer in any true sense selected by the State; they will be selected to a large extent at any rate by persons whom the State has never authorized to vote for them, and that State will cease to have *any* "suffrage" in the Senate.

In this way this great "palladium to the residuary sovereignty of the States," as Madison called it, would be in effect completely broken down.

This contention will be found clearly set forth in Petitioner's Third Prayer which was refused by the Court below (Record, p. 142).

PROPOSITION IV.

The prohibition against the adoption of any amendment whereby a State is deprived of its equal suffrage in the Senate without its consent involves two things—first, that if the State chooses to consent it MAY be deprived of its equal suffrage in the Senate; and, second, THAT IT MAY NOT BY ANY AMENDMENT BE DEPRIVED OF ITS POWER TO GIVE OR REFUSE ITS CONSENT.

If the latter contention be not true, then in order to absolutely nullify this "palladium to the residuary sovereignty of the States" it would be only necessary to adopt an amendment changing its electorate to a sufficient extent.

It is easy to see if any interference with the electorate of a State is permitted its power to refuse its consent to any amendment which may *hereafter* be proposed, including an amendment reducing the number of its Senators, may be taken away. All it would be necessary to do to accomplish that purpose would be to designate in the proposed amendment some class of persons or some person who were or was to be solely permitted to vote for Senators and Legislators in Maryland, who were known to be in favor of such change or reduction in the representation of Maryland in the Senate, and the same result would have been attained indirectly as would have been accomplished by the enactment of an amendment in the first instance reducing Maryland's representation in the Senate to one or to nothing.

An excellent illustration of what we mean is furnished by the action of the State of Vermont upon the Nineteenth Amendment. Prior to the proclaiming of the amendment by the Secretary of State, the Governor had refused to call into session the Legislature of that State to ratify.

Subsequent to the proclaiming of the amendment, however, and *when the women were voting* in Vermont in pursuance thereof, a Legislature elected under Woman's Suffrage passed a resolution ratifying the amendment, thus demonstrating the fact that the State of Vermont as that State was constituted prior to the proclaiming of the amendment had been deprived of its power to refuse to consent to any amendment which might be proposed.

Our contention is this: The clear and necessary effect of the proviso reading "that no State *without its consent* shall be deprived of its equal suffrage in the Senate" is as follows:

The power of a State to consent or refuse to consent to amendments which may operate to deprive it of its equal suffrage in the Senate is expressly reserved and withheld from the scope of the amending power altogether.

Now whatever method may be recognized by the Constitution as the method by which the State may express its consent or its refusal to consent, that is, whether this consent may be given or refused by the Legislature of the State, or by its people in Convention, or even, had it been so provided, by a referendum vote, *in any case* the vote of the State's electorate is indispensable. The State's own voters must elect the Legislature or the Convention, or if it had been permitted, must vote on the referendum.

The consent of the State cannot be given or cannot be refused except by the will expressed either directly or indirectly of the State's own voters.

Therefore it follows necessarily that the right of the State's own electorate to vote is a right reserved and withheld from the scope and operation of the amending power altogether.

From the beginning of this case in the Court of Common Pleas, and again in the Court of Appeals of Maryland, we have challenged our opponents to answer

this proposition. Up to the present time it has remained unanswered.

> "Suppose an article had been introduced into the Constitution empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarranted transposition of power, and as a premeditated engine for the destruction of the State Government? The violation of principle in this case would have required no comment."

And a little earlier in the same article:

> *"Every government ought to contain in itself the means of its own preservation."*
>
> Alexander Hamilton, "Federalist," No. 59, pages 238, 239. (The italics are by Hamilton.)

How can these governments contain the means of their own preservation unless this Court has and will exercise the power to preserve them?

How can a State have the *power to consent* if its *means of consenting* may be taken away and this Court refuses to prevent it?

PROPOSITION V.

The various cases decided by this Court since the Civil War, including the case of Myers vs. Anderson, 238 U. S. 368, in which, without going at all into the question of the scope and limits of the amending power granted in Article V, this Court nevertheless then recognized the Fifteenth Amendment as being in effect valid as a part of the Constitution, constitute no precedents for holding the Nineteenth Amendment valid, for the reason that any amendment, however radical, which has received the unanimous assent of the

States—has been, in fact, consented to, however reluctantly, by each and all of them, is valid and had to be accepted by this Court as being valid when the question of its validity was raised for the first time in Myers vs. Anderson, forty-five years after its adoption, no State nor any citizens of any State having ever disputed its validity prior to that case.

We may assume for the sake of the argument (and only for that purpose—see Original Brief, pages 94-100), that if the Fifteenth Amendment had been adopted in time of peace, the same objections to its validity could have been urged which are now being urged against the Nineteenth; provided its validity had been challenged at the time of its adoption, or, at any rate, within some reasonable time thereafter.

But it must be conceded that any amendment, however radical the change it made in the Constitution of a State, which has once been actually consented to by each and all of the States in the Union, will have to be recognized as valid by this Court.

And that is exactly what has happened in the case of the Fifteenth, as well as the Thirteenth and Fourteenth Amendments.

So far as the seceding States were concerned, this consent was given by the formal action of their respective Legislatures. It may be perfectly true that it was an unwilling consent in the case of most of them. It was a consent which they were compelled to give by the action of Congress in pursuance of its policy of reconstruction. It may be said that it was given under duress, but, as we say in our Original Brief (page 90),

"however duress may be held to avoid individual contracts, it is emphatically true that it is no defence against the enforcement of the obligations of sovereign States. The Treaty of Versailles is just as binding and will be recognized by this Court as just as binding upon Germany as any ordinary treaty of commerce and amity entered into by her in times of peace."

While it may be true that no formal treaty of peace was entered into by the Government of the United States and the Confederate States, or any of them, the substance of a treaty was enacted in the three articles of amendment of the Constitution, the Thirteenth, Fourteenth and Fifteenth, settling for all times the questions which caused or which grew out of the Civil War, and which it was deemed necessary to have settled in order to prevent the possibility of the revival of the controversies between the States which had caused that War.

Slaughter-House Cases, 16 Wall. 36, 67, 71.

It may be true that this involves the contention that the effect of war and the necessity of taking measures to prevent the recurrence of war, *expands* the amending power, but it is submitted that there is nothing unreasonable in that contention.

The same effect would undoubtedly be produced by the same causes upon the Treaty-making Power. While the power to make treaties with foreign countries is conferred by the Constitution upon the President, subject to the ratification of the Senate, in the broadest possible terms, nevertheless, this Court has held:

> "The treaty power, as expressed in the Constitution, is in terms unlimited *except* by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."
>
> Geofroy vs. Riggs, 133 U. S. 258, p. 267.

This, of course, is all true as regards a treaty made in time of peace. But suppose the United States were to become involved in a war with a foreign power and its Navy were to be destroyed, its land forces defeated and it found itself in a situation where in order to prevent the complete subjugation of the whole country it was necessary to make a treaty of peace which included the cession of some portion of the territory of a State without the consent of that State. Would this Court consider itself at liberty to refuse to recognize that treaty as being valid and binding?

We know very well that it would not—that it could not. If, after the expiration of a period of forty-five years the validity of that treaty were called in question as the validity of the Fifteenth Amendment was called in question for the first time in the case of Myers vs. Anderson, 238 U. S. 368, would not this Court deal with the objections to its validity in the same way in which it dealt with the objections urged against the validity of the Fifteenth Amendment in that case, viz:

Ignore them altogether and decide all other questions raised in the case with the tacit assumption that the treaty was valid.

All the non-seceding States, some of them, it is true, very reluctantly, ultimately gave their consent to the Fifteenth Amendment.

It is true that the Legislatures of some of them had refused to ratify the Amendment. Such was the case in Maryland, Delaware, Kentucky, Tennessee, Oregon and California. But after the Amendment had been proclaimed, these States, each and every one of them, and the people of these States, evidenced their consent to and acquiescence in it in the clearest possible way, by not only refraining from contesting it or challenging its validity for forty-five years, but in each and every State, the people acting through successive legislatures passed laws either for the enforcement of the amendment or in recognition of its valid existence.

It is true that during all this time, as we have hereinbefore observed, the voice of the State governments was throttled by the new constituency. The officials of the State being responsible to a new constituency could hardly be expected to institute proceedings to disfranchise a part of that constituency any more than they have done in the case now before this Court. But it is to be remembered, of course, that it is the people who vote that politically constitute the State, and each and every one of them had during that whole period of forty-five years the right to contest the validity of this amendment on his own behalf and that of his fellow-voters, or his fellow-citizens, and they did not do it.

The conclusion that the Fifteenth Amendment had been accepted or assented to unanimously by the several States of the Union, and especially by the people of the several States, is therefore one which the Supreme Court was bound to indulge when after forty-five years the validity of the amendment was challenged.

The 15th Amendment was not necessarily invalid. If consented to by the people of the several States it would become valid. No better evidence of consent is known in law than the failure to object when opportunity to object is offered.

That consent may be inferred from long acquiescence is a doctrine too familiar to be disputed, and that consent will validate amendments that are expressly declared to be invalid without consent is too obvious to be questioned.

The *assumed* validity of the 15th Amendment can therefore form no precedent for this case.

For further discussion on this point, see Original Brief, pages 85-100, under the head: "The Fifteenth Amendment and Decisions Thereunder Do No Govern this Case," and especially the sub-head (b) "The Conditions Under Which Reconstruction Was Accomplished After the Civil War Removed the Question of Consent From the Realm of Judicial Decision," and (c) "Example in Creation of West Virginia" (pages 90-93).

PROPOSITION VI.

The Nineteenth Amendment has never been legally ratified by the requisite number of States, even assuming that the

State Legislatures are competent to ratify an amendment like the Nineteenth, which radically changes, and, in fact, nullifies so vital a part of their State Constitution as that which limits the right of suffrage to men, by conferring it upon women. Neither Tennessee nor West Virginia ever ratified at all.

1. Tennessee and West Virginia in fact refused to ratify the Amendment. Both of these States must be counted in order to make up the requisite thirty-six, or three-fourths.

a. That the Legislature of Tennessee not only did not ratify, but actually rejected the amendment by a large majority appears from a simple inspection of the official record of the proceedings of that Legislature produced in evidence in this case (Record, page 11, 29). That record shows these simple facts, viz: That a resolution ratifying the Amendment was submitted to one branch of the Legislature and adopted by a majority of one vote; that immediately thereafter and within the time prescribed by the law of the State, a motion to reconsider this resolution was made; that pending this motion the action of the House on the resolution was not final; that a few days later when there was no quorum and nothing approaching a quorum present, this same House defeated the motion to reconsider; that ten days later at a session of the House when there was for the first time a quorum present, the motion to reconsider was adopted by an overwhelming majority, the resolution of ratification defeated and all the proceedings taken by the rump House in the absence of a quorum expunged from the record.

There was never any certificate by the Governor of Tennessee to the Secretary of State of the United States to the effect that the resolution of ratification had been adopted "in accordance with the Constitution," as provided in R. S. 205, or even in accordance with the requirements of the law of Tennessee.

The contention that this Court cannot look at that record cannot be sustained by any authority.

No Court of Tennessee or any public official clothed with the power or jurisdiction to do so, has passed on the question as to whether the amendment has been legally ratified by the Legislature of that State, but it has been held by the Courts of that State in the cases referred to in our Original Brief, that in a case of this kind those Courts will inspect the record for the purpose of determining as a matter of fact if the law or resolution in question has been adopted in the manner required by the law governing the procedure of the Legislature, and it is submitted that this Court has the power to do the same in a case like the present where the Tennessee Court has not acted.

For a full discussion of this point, see Original Brief, page 100, and sections of brief there referred to on page 13.

b. In the case of West Virginia it appears that the Senate finally defeated the resolution of ratification on March 3, 1920, the action of the Senate taken on that day having that effect according to the local law. It was, however, prevented by the refusal of the lower House, from adjourning, and when after an interval

the two members absent on that date appeared, one of them only being recognized as entitled to a seat, and the other being ousted, the whole matter was brought up again, contrary to the established rules, and by the help of the former absentee, who was seated, the resolution was again put to a vote and declared carried.

We submit that we have shown clearly that by the settled law of the State of West Virginia the earlier action of the House was, under the circumstances, the only authentic action in the premises (Original Brief, pages 102, and 12).

2. The Legislatures of five States, Missouri, Tennessee, West Virginia, Texas and Rhode Island, were, by the provisions of their respective State Constitutions, expressly forbidden to adopt amendments of the character of the Nineteenth, and were therefore incompetent to ratify that amendment.

As regards the case of Missouri, the situation is simply this: The Constitution of that State provides as follows:

> "Article II, Sec. 3. We declare that Missouri is a free and independent State, subject only to the Constitution of the United States; and as the preservation of the States and the maintenance of their governments are necessary to an indestructible Union and were intended to co-exist with it, the Legislature is not authorized to adopt nor will the people of this State ever assent to any amendment or change to the Constitution of the United States which may in any wise impair the right of local self-government, belonging to the people of this State."

That the Nineteenth Amendment impairs the right of local self-government is, of course, manifest.

If an amendment which takes away from the people of the State—those who constitute the whole body politic—the electorate—the right to say who shall be admitted to participate with them in the power of government,—who shall constitute the electorate, who shall be the State, who shall vote at the State elections,—does not interfere with the right of local self-government of that State, nothing can.

The only question is whether or not this provision of the Constitution of Missouri is in conflict with and is nullified by the provisions of Article V of the Federal Constitution. We submit that there is no such conflict. It is true that the power of the Legislature of Missouri to ratify Federal amendments is derived from Article V. The State has not conferred, and it may be, that it could not confer any such power upon its Legislature.

But let us examine the language of Article V on this point. It is this: That "Congress shall have power to propose amendments, which * * * shall be valid to all intents and purposes as a part of this Constitution when ratified by the Legislatures of three-fourths of the several States or by conventions in three-fourths thereof."

Now who is to say "when" these Legislatures or these Conventions shall act on an amendment or proposed amendment? Certainly no language can be found in Article V conferring upon Congress the power to do so.

There is a marked difference between this part of Article V and the provisions of Article I of the Constitution relating to the election of United States Senators. While the Senators were to be elected by the State Legislatures, the time and manner of the election was subject to the regulation of Congress. But here is no such grant to Congress of the power to prescribe the time at which or the manner in which the Legislatures shall act in ratifying a proposed amendment.

Obviously the Legislature being the creature of the Constitution of the State can only act at the time and in the place and in the manner prescribed by that Constitution. That State Constitution being the creation of the people of the State, the people of the State may provide therein that the Legislature *shall not assemble at all* for an indefinite time.

There is no Legislature in any legal sense until the persons elected to serve as members of that body shall have been called together at the time and in the manner prescribed by the people in the Constitution.

It is plain, therefore, that if the people of Missouri had a right to say "when" their Legislature shall act on this amendment, they had the right to say "never"—that it should never act on any amendment of this character. And they have said so in their Constitution. Who shall say them "nay"?

Certainly Article V imposes no *duty* either upon the Legislature or upon the people of Missouri to act upon any amendment until they are ready to do so. It simply confers upon them the *privilege* through their

Legislature or Convention, as the case may be, to ratify a proposed amendment and thereby cast one vote in favor of its adoption as a part of the Constitution of the United States. Therefore, when the Legislature of Missouri ratified this amendment in defiance of the prohibition contained in its State Constitution, they acted at a time when they had no power to so act, because they had been forbidden to act by the only authority which had the right to determine *when* they should act.

The case of Tennessee on this point is even clearer. The Constitution of that State provides as follows:

> "Article II, Section 32. Amendment to Constitution of the United States:
>
> "No convention or general assembly of this State shall act upon any amendment of the Constitution of the United States proposed by Congress to the several States; unless such convention or general assembly shall have been elected after such amendment is submitted" (Record, p. 27).

Now it appears from the evidence in the Record (pages 54-65) and is conceded (page 157), that the General Assembly of Tennessee which acted on the amendment had been elected *before* the amendment was submitted or proposed by Congress.

This provision of the Constitution of Tennessee was manifestly intended to prevent its Legislature from exercising the power conferred by Article V to ratify amendments to the Federal Constitution, especially amendments such as the Nineteenth, which radically change and nullify the most important provision of its

own Constitution relating to suffrage, until such time as the people of Tennessee should have had an opportunity to elect a Legislature which would actually represent their wishes in regard to so vital a matter. It would seem to be simply incredible that the statesmen who constituted a majority, at any rate, of the Constitutional Convention of 1787—jealous as they were of the rights of their sovereign States—intended by the language used in Article V to deprive the people of any State of a right so essential to their very existence as a State.

The obvious purpose which the people of Tennessee had in adopting this provision of their State Constitution was to prevent their Legislatures from acting hastily and without taking time to ascertain the sentiments and feelings and wishes of the people themselves regarding so vital a matter as a change, perhaps a radical change, in the Federal Constitution.

It was an effort to protect themselves against one of the gravest of calamities that can befall a people,—the government of statesmen in a hurry.

We feel assured that this great Court will concur with us in the view that any official,—executive, legislative or judicial,—State or Federal,—who acts hastily and without the most thoroughgoing consideration upon questions of this character is simply false to his trust.

No better illustration could be furnished of the importance,—nay, it may almost be said, of the necessity,—of a provision of this kind in State Constitutions

than that which is afforded by the history of the manner in which and the circumstances under which this so-called Nineteenth Amendment was rushed through the Legislatures of so many of the States of this Union. In many of these bodies it was not even debated. Some of them actually raced to see which could ratify quickest. In the case of 12 States the Legislatures voted in flat defiance of an overwhelming public opinion on the question of suffrage expressed at the polls in their States but a short time before. And in 34 out of 37 States the Legislatures had been elected before the amendment was proposed, so that the people had never had an opportunity of electing the kind of men whom they might have wished to elect had they known that so grave a question would be submitted to their decision.

If this amendment could be carried through by such methods as these, it is easy to see that other amendments will be carried through in the same fashion to the ultimate wreck of our whole system of Constitutional representative government. The suggestion that this great Court shall sit complacently by, powerless to protect our constitutional system of representative government from such wrecking methods as these is not a pleasing thought.

In any event, when the provisions of Article V are read in connection with the history of the times, and especially with the debates of the Conventions which attended its adoption, no such conclusion would seem possible. (See Original Brief, pages 103, 104, 111, 113.)

The States alone determine the "times, places and manner" in which their Legislatures shall vote on ratification of amendments, and clearly they may fix such times as are reasonable.

The Constitutions of the States of West Virginia, Texas and Rhode Island also contain provisions, which although perhaps not quite so specific as those of the Constitutions of Missouri and Tennessee, are manifestly intended to prohibit their Legislatures from ever ratifying amendments such as the Nineteenth. That will be found fully discussed in our Original Brief, pages 102 to 117.

CONCLUSION.

The gravity of the question presented for adjudication in this Court need scarcely be enlarged upon. It is greatly accentuated by the political conditions and tendencies of the hour. Especially the tendencies which have developed since the decision of this Court in Rhode Island vs. Palmer, wherein it was held that the adoption of an amendment like the Eighteenth, which not merely confers upon Congress the power to enact a Prohibition law, but which is itself the direct enactment of a Prohibition law, was within the scope of the amending power.

Prior to that amendment the right to legislate with reference to the manufacture, sale, importation or exportation of intoxicating liquors was one of the powers not delegated to the United States, but reserved to the States in Article X of the Federal Constitution.

This decision will certainly be cited as a precedent for holding valid any future amendment or any number of successive amendments which may be proposed, transferring other reserved powers of the States to the United States.

If this process should continue long enough it will necessarily result in the gravest of calamities,—the final extinction of all State powers, the establishment of a consolidated central government at Washington like that of ancient Rome, which is said to have broken down of its own weight.

That the enactment, through the machinery provided for amending the Constitution, of laws local in their nature and effect, which neither the Congress which proposes them nor the State Legislature which votes for their enactment has power to amend, alter or repeal, may ultimate in a situation most perilous to our institutions, none can fail to see. "Where there is no vision the people perish." But this drift towards centralization and the enactment of irrepealable laws may be arrested, and in all human probability will be, provided the several States preserve their "independent autonomy,"—their power to refuse to consent to proposed amendments. They lose that independent autonomy the moment that it is decided that the power of amendment delegated in Article V of the Federal Constitution to Congress and some of the State Legislatures goes to the extent of authorizing an amendment which deprives any State, without its consent, of its right to say who shall vote at its own elections, who shall grant its consent.

If this Court should find itself compelled to hold that it has no right to declare amendments of this kind void, but must sit here powerless to defend this great fabric of Constitutional Government against such attacks as these, the same result will inevitably follow as would have followed if it had adopted that view of its power and its duty when the question of whether it could protect the Constitution against such attacks from Congress alone first came before it for decision in Marbury vs. Madison—one hundred and eighteen years ago.

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